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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 23

SOLOMON MICHELSON, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 20, 1948.

CERTIORARI GRANTED APRIL 5, 1948.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee,

against

SOLOMON MICHELSON, Defendant-Appellant

STATEMENT UNDER RULE 13

The indictment in two counts was filed in the United States District Court for the Eastern District of New York on September 3, 1946. It charges appellant with violations of the bribery statute, 18 U. S. C. A. 91. Count I charges that defendant did give $5,000 to an Internal Revenue Agent, and Count II charges that defendant did offer the said sum of money to the same Internal Revenue Agent, with the intent to influence the Agent's decision on a matter then pending before him, with the intent to influence said Agent to collude in and allow a fraud on the United States, and with the intent to induce said Agent to do an act in violation of his lawful duty.

The trial, resulting in a conviction, was held before Honorable Harold M. Kennedy, United States District Judge, and a jury, on January 2, 3, 6 and 8, 1947. A verdict of guilty was returned by the jury on both counts.

The sentence imposed by the Court on January 16, 1947, provided that defendant be imprisoned for 18 months on each count, prison sentences to run concurrently; a fine of $1.00 was imposed under Count I, and a fine of $2,500 was imposed under Count II. Defendant to stand committed until fines are paid or until he is otherwise discharged as [fol. 2] provided by law. Defendant filed a notice of appeal on January 16, 1947, and was released on bail pending appeal pursuant to order of the District Court. The fines imposed were deposited with the Clerk of the District Court pending appeal pursuant to order entered January 16, 1947.

A prior trial under the indictment was held on December 9 and 10, 1946, before Honorable Robert A. Inch, United States District Judge, and a jury, which resulted in a disagreement.

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff,

against

SOLOMON MICHELSON, Defendant

INDICTMENT

The Grand Jury charges:

Count One

That on or about the 29th day of July, 1946, within the Eastern District of New York, the above named defendant, Solomon Michelson, did give a sum of money, to wit: Five Thousand Dollars ($5,000.00), to an officer and a person acting for and on behalf of the United States in an official function under the authority of the Treasury De- [fol. 3] partment, to wit: Maurice M. Kratter, Internal Revenue Agent, with intent to influence his decision and action on a question and matter then pending before him in his official capacity, with intent to influence said Internal Revenue Agent to collude in and allow a fraud on the United States and to induce him to do an act in violation of his lawful duty in respect to the defendant's income tax return. (Title 18, United States Code, Section 91.)

Count Two

That on or about the 29th day of July, 1946, within the Eastern District of New York, the above named defendant, Solomon Michelson, did offer a sum of money, to wit: Five Thousand Dollars ($5,000.00), to an officer and a person acting for and on behalf of the United States in an official function under the authority of the Treasury Department, to wit: Maurice M. Kratter, Internal Revenue Agent, with intent to influence his decision and action on a question and matter then pending before him in his official capacity, with intent to influence said Internal Revenue Agent to collude in and allow a fraud on the United States and to induce him to do an act in violation of his lawful duty in respect to the

defendant's income tax returns. (Title 18, United States Code, Section 91.)

A True Bill.

Emil C. Zimmermann, Foreman.

J. Vincent Keogh, United States Attorney, Eastern District of New York.

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUMMARY OF CLERK'S DOCKET ENTRIES SHOWING PROCEEDINGS IN THE DISTRICT COURT

1946

Sept. 3. Indictment filed.

Sept. 9. Before Moscowitz, J. Defendant and counsel Louis J. Castellano present. Clerk hands defendant copy of indictment. Defendant arraigned and pleads not guilty. $5,000 bail continued and defendant ordered to return October 2, 1946.

Dec. 9. Before Inch, J. Case called, defendant present. Trial ordered and adjourned to December 10, 1946. Defendant remanded.

Dec. 10. Before Inch, J. Case called, defendant present. Trial resumed. Jury retire. Jury return at 9:55 P. M. having failed to reach a verdict. Court declares a mistrial. Jury discharged. Bail fixed at $5,000. Defendant ordered to return January 2, 1947.

1947

Jan. 2. Before Kennedy, J. Case called, defendant present. Trial ordered and adjourned to January 3, 1947, at 2 P. M.

[fol. 5] Jan. 3. Before Kennedy, J. Case called, defendant present. Trial resumed and adjourned to January 6, 1947.

Jan. 6. Before Kennedy, J. Case called, defendant present. Trial resumed and adjourned to January 8, 1947.

Jan. 8. Before Kennedy, J. Case called, defendant present. Trial resumed. Jury retire. Jury returns and renders a verdict of guilty on each of Counts I and II. Defendant continued on bail to January 16, 1947, for sentence.

Jan. 16. Before Kennedy, J. Defendant and his counsel present. Defendant is sentenced to be imprisoned for 18 months and to pay a fine of $1.00 on Count I and to be imprisoned for 18 months and to pay a fine of $2,500. On Count II, defendant to stand committed until said fines be paid or he be otherwise discharged as provided by law, without costs and sentences of imprisonment on each count are to run concurrently.

Jan. 16. Judgment and commitment file, certified copies delivered to U. S. Marshal.

Jan. 16. Notice of Appeal filed.

Jan. 16. By Kennedy, J. Order filed fixing bail of $5,000 pending appeal.

Jan. 16. By Kennedy, J. Order filed for deposit of fine in Registry of Court pending appeal.

Jan. 16. By Kennedy, J. Order filed extending time to file record on appeal to April 16, 1947, and term of Court for one year.

Jan. 16. Notice of taking of appeal mailed to U. S. Marshal.

Jan. 16. Clerk's Statement with copy of notice of taking appeal mailed to Circuit Court of Appeals.

Jan. 17. Appeal Bond No. 41083 filed.

[fol. 6] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

Cr. #41165

UNITED STATES OF AMERICA

vs.

SOLOMON MICHELSON, Defendant

Transcript of Trial Proceedings

Brooklyn, New York,
January 2, 1947.

Before Honorable Harold J. Kennedy, U. S. D. J., and a Jury

APPEARANCES:

J. Vincent Keogh, Esq., United States Attorney for the Eastern District of New York (by Mario Pittoni, Esq., As-

sistant United States Attorney, for the United States of America.

Daniel McNamara, Esq., attorney for the defendant (by Louis J. Castellano, Esq., of counsel).

[fol. 7] Brooklyn, New York,
January 3, 1947.

Appearances: As before noted.

TRIAL CONTINUED

MAURICE M. KRATTER, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Pittoni:

Q. Mr. Kratter, you are an agent in the Internal Revenue Department?

A. That is right.

Q. How long have you been such an Internal Revenue Agent?

A. Since November, 1945.

Q. That is a little over a year ago, is that correct?

A. That is right.

Q. What are your duties as an Internal Revenue Agent?

A. My duties a e to examine information reported on income tax returns that are assigned to me by my squad chief, and to verify the net income as reported or to suggest and recommend any changes that I find warranted.

Q. Am I correct in saying that you make investigations from a civil standpoint?

A. That is right.

Q. Previous to your becoming an agent in the Internal Revenue Department, what was your occupation?

A. I was working for a firm of certified public accountants.

Q. Are you a C. P. A.?

A. I am.

Q. How long have you been a certified public accountant?

A. Since 1938.

Q. Now, Mr. Kratter, during the course of your duties were you assigned, or were you given the assignment of [fol. 8] investigating the records of Mr. Solomon Michelson.

A. Yes, the tax return of Solomon Michelson——

Q. Just answer yes or no, please.

A. Yes.

Q. Did you thereafter go to the premises of Mr. Solomon Michelson?

A. I did.

Q. And the Solomon Michelson whose premises you visited, is that the Solomon Michelson, the defendant, now on trial?

A. Yes.

Q. Now, Mr. Kratter, when is the first day that you ever went to the premises of Solomon Michelson?

A. On July 16th at about 3:30 in the afternoon.

Q. Previous to that time did you make any attempts to find Mr. Solomon Michelson?

A. I did.

Q. On the 15th did you do anything in regard to the defendant, Solomon Michelson?

A. May I explain the reason why I did——

Q. Just answer the question first?

A. On the 15th I went to the office of the New York City Tax Department in an attempt to locate Mr. Solomon Michelson's place of business—

Mr. Castellano: I object to that, your Honor.

The Court: Yes. You went to the City Tax Department?

The Witness: I went to the City Tax Department.

Q. Did you find the address of Solomon Michelson on that day?

A. No, I did not.

Q That was the 15th, is that correct?

A. That is the 15th.

Q. Now, the following day where else did you go and attempt to find the address of Solomon Michelson?

A. On the following day I went to the office of the New York City Department of Licenses.

Q. Yes. Did you get the address of Solomon Michelson?

A. I obtained the address of Mr. Michelson's place of business from the files of the Department of Licenses.

[fol. 9] Q. Did you on the same day, then, go to the place of business of Solomon Michelson?

A. I did.

Q. About what time of day did you get there?

A. About 3:30 in the afternoon of the 16th of July.

Q. How long were you there on the 16th, that is Tuesday, now.

A. That was Tuesday. For about 15 or 20 minutes.

The Court: We will take a short recess.

(Short recess.)

Q. Now, on the 16th, that is Tuesday again, how long did you spend at the place of business of Solomon Michelson?

A. About 15 or 20 minutes.

Q. Briefly, what was the conversation?

A. I presented myself to Mr. Michelson, told him who I was and told him I had been assigned his tax return for examination, and asked him if he would show me what books and records he had there.

Q. At that time did you have a conversation with him about his own accountant?

A. Well, he told me he wanted to find out if his accountant would approve my looking at his books and records.

Q. He told you what?

A. He told me that he wanted to find out if his accountant would approve my examining his books and records.

Q. What did you do then?

A. Well, he pointed out a telephone to me and I called up the accountant.

Q. Who gave you the number?

A. Mr. Michelson gave me the phone number.

Q. What was the gist of the conversation between you and the accountant?

A. I told the accountant who I was——

Mr. Castellano: I object to that.

The Court: This was in the presence of the defendant? [fol. 10] Mr. Pittoni: Well, the conversation between the agent and the accountant, of course, was on the telephone.

The Court: Yes, but he can state what he said.

Mr. Pittoni: This was in the presence of the defendant?

The Court: It was in the presence of the defendant?

The Witness: This was in the presence of Mr. Michelson.

The Court: Tell us what you said.

The Witness: I told the accountant who I was, that I was at Mr. Solomon Michelson's place of business, that I had been assigned his tax return, his income tax return for routine examination, and that Mr. Michelson wanted to get his, that is, the accountant's approval, for me to make the examination.

Q. Thereafter what did you say to Mr. Michelson?

A. Mr. Michelson spoke to his accountant thereafter.

Q. What did you say to Mr. Michelson?

A. I told Mr. Michelson his accountant wanted to speak to him.

Q. And you left the telephone?

A. And upon speaking to Mr. Michelson, after Mr. Michelson took the phone and spoke to the accountant he told me that he would show me his books and records. I looked at them to see if he had all the records that I would need for the examination, and told him I would be back on the following day.

Q. Where did you go after you left Mr. Michelson's premises on Tuesday, July 16th?

A. I returned to my office.

Q. Your office where?

A. 165 Broadway.

Q. Now, the following day, Wednesday, July 17, 1946 did you go to the premises of Solomon Michelson?

A. On July 17th I went to Mr. Michelson's place of busi- [fol. 11] ness at 74 Bowery at about 11 o'clock in the morning as we had agreed. I was to meet his accountant there at 12.

Q. When you went into the premises of Solomon Michelson on Wednesday, the 17; what did you do?

A. I asked Mr. Michelson to give me his books and records.

Q. Are those the same books and records which you had been shown the day before?

A. That is right. They were the same.

Q. Did you look at the books and records?

A. I sat down at a desk behind Mr. Michelson's counter and I started examining the books and records.

Q. How long did you look at the books and records before you got involved in any conversation with Mr. Michelson?

A. About an hour and a half I would say.

Q. In the meantime did you talk to Mr. Michelson?

A. I asked him for certain other records I needed to support the books, but there was no general conversation.

Q. In your examination of the books and records on that morning before you went to lunch what did you find?

Mr. Castellano: I object to what he found. We are not trying a tax case.

The Court: Sustained. (Addressing witness) What did you say to Michelson after your examination, if anything?

The Witness: Before going to lunch I pointed out to Mr. Michelson there were numerous cash purchases recorded on the books and I would like to see his purchase vouchers in substantiation of these entries. He said he might be able to find some invoices to support these purchases.

Q. Did you make any examination of the brokerage statements for 1942?

A. Just prior to the time we went out to lunch I asked Mr. Michelson for the brokerage statements to substantiate his security transactions which were recorded on the income [fol. 12] tax return. I examined the statements for the first few months of 1942 just prior to going out to lunch.

Q. After you looked at the couple of months of 1942 what did you do?

Mr. Castellano: I object to anything further along this line.

The Court: What is the question?

Mr. Pittoni: He has just finished testifying he made an examination of the brokerage statements for 1942 and I said, "After you made that examination of a couple of months what did you do?"

The Court: I sustain the objection. (Addressing witness) Did you communicate anything to Mr. Michelson about what you found concerning brokerage statements on that day?

The Witness: Yes.

The Court: When? After lunch?

The Witness: No; just before we went out to lunch.

The Court: What did you say to him and what did he say to you?

The Witness: I pointed out to Mr. Michelson there were numerous credit entries on the brokerage statements representing deposits of cash and checks.

Mr. Castellano: I make the same objection.

The Court: It is part of a conversation. I overrule it.

Mr. Castellano: Exception.

The Witness: I asked Mr. Michelson what these deposits represented and he could not explain them to me.

Q. Then what did you do after that?

A. Then I told Mr. Michelson that it appeared that his [fol. 13] accountant was not coming and so I would go out to lunch at that time. It was about 1:15 already.

Q. Did you go out to lunch alone?

A. No. Mr. Michelson said he would come out with me.

Q. Did you suggest to Mr. Michelson that he go with you?

A. No, I did not.

Q. Who made the suggestion?

A. Mr. Michelson just said he would come along with me.

Q. Up until that time was there any conversation of any kind with respect to paying you money?

A. No, none whatsoever.

Q. Where was this cafeteria that you went to lunch?

A. The Cafeteria was directly across the street from Mr. Michelson's place of business at 74 Bowery.

Q. You say Michelson came along with you?

A. That is right.

Q. How many people were in the place, roughly, when you went in there?

A. Well, the crowd—the place was quite crowded. I would say most of the seats were occupied.

Q. Did you and Mr. Michelson sit together?

A. Yes, we sat together.

Q. Did you talk to Mr. Michelson while you were sitting there having your lunch?

A. Yes, we had a conversation.

Q. In general, what was the conversation about?

A. Well, at first the conversation was general. We were talking about the particular restaurant there that we were in and then Mr. Michelson gradually turned the conversation towards his income tax return and he wanted to know what would have to be done in connection with straightening out his income tax return.

Q. What did you say to that?

A. I told him I had not finished my examination at that time and I would have to finish the examination before I knew what the entire difficulty was.

[fol. 14] Q. How long were you in the restaurant with Mr. Michelson?

A. About 30 or 40 minutes I would say.

Q. While you were in the restaurant with Mr. Michelson did he at any time point out anybody to you in the restaurant?

A. No, he did not.

Q. You say you were in the restaurant about 20 minutes; is that correct?

A. About 20 minutes; that is right.

Q. After you left the restaurant what did you do?

A. After we left the restaurant we started to take a walk, and as we left the restaurant we might have walked about 30 yards when Mr. Michelson took a roll of bills out of his pocket and said, "Here is $100", and offered the bills to me while we were walking on the street. I pushed his arm away and walked away from him and I said to him, "What is the matter with you? Is there something wrong with you?" And I walked away from him and I wanted to turn around and go back to the store where his place of business was and Mr. Michelson said, "Let us go for a walk", and he insisted we go for a walk, he wanted to talk to me about his income tax return.

Q. And you walked with him?

A. I walked with him because he refused to go back to his place of business unless we went for a walk and had this opportunity to have a conversation.

Q. During your walking with Mr. Michelson did he offer any more money to you?

A. He asked me how much I wanted to fix up the matter so that he would not have to pay too much to the Government and I told him I wouldn't do anything for him like that. He offered me $250 and I refused it and then he offered me $300 and he told me that was all he had at the place of business. I told him I wouldn't touch it. He insisted that we talk about it, and kept walking, and finally we reached a park in the neighborhood there, about two or three blocks away, and we sat down there for a time and continued talking. I tried to tell Mr. Michelson, I tried to con-

[fol. 15] vince him we should return to his place of business. I said I wanted to return to his shop and finish the examination. He insisted that we come to some sort of an agreement regarding the settling of his income tax return, or what I would report as being deficient on his tax return. We had a conversation that lasted about an hour, I would say, and we sat on the bench in the park for a while and we got up and walked around some more. Michelson finally said he would give me $1,000 to fix things up. I told him I wouldn't think of it, I didn't want to get involved in any such business. He insisted and refused to return to his place of business.

Q. Why didn't you go back to his place of business and look at the books by yourself?

Mr. Castellano: I object to that.

The Court: Sustained.

A. He kept on insisting that I take something——

Mr. Pittoni: Wait a minute. The objection was sustained.

The Court: There is no question pending.

Q. At any rate, during the course of your duties as an Internal Revenue Agent, do you ever make any examination of books without the presence of the taxpayer or his accountant?

Mr. Castellano: I object to that as irrelevant.

The Court: Overruled.

Mr. Castellano: Exception.

A. No.

Q. All right. Now, eventually you went back to the store; is that right?

A. Well, we eventually went back; that is right.

[fol. 16] Q. Was there any further conversation between you and Mr. Michelson about the paying of money until you finally went back to the store?

A. Well, when Mr. Michelson kept insisting and refused to return to the store, I finally told him O.K. when he said he wanted to give me $1,000 to straighten up his tax. Then immediately thereafter he said, "Make it $800", and I said, "O.K.", in order to get back to the store.

Q. You were back at the store already now?

A. No. This was prior to the time we left the park.

Q. When you went back to the store what happened?

A. When we went back to the store I continued my examination and examined the remainder of the brokerage statements for 1942 and 1943.

Q. Yes.

A. Then made certain records of the amounts that had been deposited in those brokerage statements. Mr. Michelson was still unable to explain what these deposits represented.

Q. Did you draw his attention to these various deposits?

A. Yes. I asked him again, when I saw that the sum was increasing each month, I asked him what these items represented and he was unable to explain it at any time at all.

Q. How long were you there before you had any conversation which had not to do with the books? At any rate, you drew his attention to these brokerage accounts; is that right?

A. That is right.

Q. He did not give you an explanation?

A. No.

Q. What happened after that?

A. Well, soon after we returned to this store from the walk after lunch Mr. Michelson dropped a package at my feet and said, "Here is the $800." I continued my examination and did not touch the package, and at a little after 4, I believe it was, I finished my examination and I put my papers together and put them in my bag and got up. I lifted the package from the floor and gave it back to Mr. Michelson and I said I wouldn't take the money. He [fol. 17] insisted on talking to me. He sort of stood in the way of the exit and would not allow me to pass and to go out into the street. He has a part of a large store in one of the jewelry exchanges on the Bowery, and there was a counter behind which I was working and the counter has just about enough room for one person to stand behind or to move around behind and one person can very conveniently block the exit. I did not try to force my way out. I wanted to be agreeable to him as far as his income tax investigation was concerned. I stood there talking to him for a while and he insisted I come to some sort of an agreement with him regarding fixing up his income tax return. I refused. I told him I would not do anything for him. I told him

it appeared at this time he owed the Government about $25,000——

Mr. Castellano: I object to this as irrelevant to this issue.
The Court: Not at all. It is a part of a conversation.
Mr. Castellano: Exception.

A. (Continued.) I told Mr. Michelson about $35,000 in deposits were entered on his brokerage statements that he was not able to explain and he had not offered me substantiation for the numerous cash purchases which were recorded on his books. I told him I would have to turn the case over to the special agents. He kept on talking to me in the same place, insisting that I do something for him, and he apparently became very frightened when he realized I had all that information and there was so much wrong——

Q. Do not give his mental conclusions. Just give us what was said.

A. It appeared to me he became very frightened and he kept on insisting I do something for him. In the meantime I gradually edged out of the store to the street and Mr. [fol. 18] Michelson walked down the street with me.

The Court: While you were in the park with Michelson did you at any time tell him that you could not or would not return to the store without him?
The Witness: That is right.
The Court: You did say that?
The Witness: Sure.
The Court: That was your practice?
The Witness: I told him I couldn't make my examination, I did not feel that was the proper procedure to make the examination without the taxpayer or his representative present.

Q. At any rate you left the store and you started going where?

A. I walked towards Lafayette Street, the I. R. T. station at Canal Street and Lafayette.

Q. Did Mr. Michelson come with you?

A. Mr. Michelson kept walking alongside.

Q. Did you and Mr. Michelson have a conversation while you were walking along together?

A. Yes, a conversation ensued during the walk. Mr. Michelson kept insisting that I do something to straighten

out his tax return and fix things up for him so he wouldn't get into too much trouble. He offered me $3,000 while we were walking toward the subway, and then he said, "Make it $5,000." I told him I wouldn't touch that kind of money, I wasn't interested in it, I didn't want to get mixed up in that situation. Then he kept insisting. We had walked about two or three blocks from his office, and I finally stopped in the street and kept talking to him. He refused to leave me, and insisted that we come to some sort of agreement regarding his tax situation. I finally told him—he said, "Will you take $5,000?" And he told me he would pay another $5,000 to the Government. I finally said, "O.K.", [fol. 19] in order to get away from him, and he told me he would call me up when he had the money, and he asked me for my business card and home telephone. I gave him one of my cards and wrote down the phone number while we were standing on the street, and then we parted.

Q. If you saw that card again would you recognize it?

A. I would.

Q. I show you a card with the name Maurice M. Kratter, and so forth, on it, do you recognize that?

A. Yes, this is the card that I just mentioned; this is the card that I gave to Mr. Michelson on the street.

Q. And what telephone number did you put on there?

A. That is my home phone number that I wrote down on the card.

Q. At the time you wrote that phone number on that card, where did you do that?

A. While we were standing there in the street, I either leaned on my knee or on the bag on something like that.

Mr. Pittoni: I offer the card in evidence, your Honor.

(Marked Government's Exhibit 1 in evidence.)

Q. Now, you say you gave this card to Mr. Michelson, is that correct?

A. That is right.

Q. How soon after you gave this card to Mr. Michelson did you finally leave him and take the subway?

A. Immediately thereafter. At first he told me he wanted me to come back to his place of business to take $3,000 which he said he had there, and that he would get in touch with me to give me the remaining $2,000 in about a week. I told him I would not take the money.

Q. Then where did you go from there?

A. From there I went home.

Q. Where do you live, Mr. Kratter?

A. At 20th Street and Fourth Avenue, Manhattan.

[fol. 20] Q. Did you make any reports for the 16th and 17th?

A. You mean time reports?

Q. That is right.

A. Yes, we make one every day.

Q. I show you two documents entitled "Daily report of official duties performed," and so forth. One is dated July 16, 1946 and the other is dated July 17, 1946. Are those reports you made of your duties?

A. On those two days, that is right.

Q. Now, Mr. Kratter, will you take the one of July 16, 1946? You have nothing on there for Mr. Michelson, have you?

A. No.

Q. Is there any particular reason why that isn't put in there?

Mr. Castellano: I object to that, your Honor.

The Court: Sustained.

Mr. Pittoni: I offer these two sheets in evidence, your Honor, July 16, 1946 and July 17, 1946.

Mr. Castellano: Are those the defendant's two exhibits used in the last trial?

Mr. Pittoni: Well, now——

The Court: Look at them, Mr. Castellano.

Mr. Castellano: Let me see them. (Cards handed to Mr. Castellano.) They appear to be, but there is no identification——

The Court: I do not care about that. Do you have any objections to these?

Mr. Castellano: No objection.

The Court: All right. Received with no objection.

(Marked Government's Exhibit 2 in evidence.)

Q. What is customary to put on those daily reports that you make, Mr. Kratter?

Mr. Castellano: I object to what is customary.

The Court: Sustained.

[fol. 21] Q. All right. Now, the following day, Thursday, July 18, 1946, what did you do in the morning?

A. In the morning I had an appointment on another examination.

Q. I see. When you got finished with that other appointment did you go back to the office?

A. Yes, I went back to the office on that day.

Q. Did you have a conversation with any other agent in the office about Solomon Michelson?

A. Yes, I reported the entire episode with Mr. Michelson to one of the older agents in my squad. He advised me——

Mr. Castellano: I object to that.

Q. Wait a minute. All right, then, now we are on Thursday, July 18th. The following day did you go to the office of the Intelligence Unit, Treasury Department?

A. That is right.

Q. Where are they located?

A. They are located at 253 Broadway.

Q. Where is your office?

A. At 165 Broadway.

Q. When you were brought to the office of the Intelligence Unit, Treasury Department, did you meet Agent Burke Yung?

A. I did.

Q. That is the gentleman sitting next to me here?

A. That is right.

Q. This is now Friday, July 19, 1946, is that correct?

A. That is right.

Q. Did you have a conversation with Agent Yung and other agents in the room about the proceedings of the previous week, I mean the previous proceedings of the week?

A. Yes, I told the entire story about my relation with Mr. Michelson to Agent Yung——

Mr. Castellano: I object to what he said.

The Court: Do you object?

[fol. 22] Mr. Castellano: To anything further, as to what he said.

The Court: To anything further?

Mr. Castellano: Yes.

The Court: Well, yes.

Q. At any rate you had a conversation with Agent Yung and other agents about the Michelson situation?

A. I did, that is right.

Q. Did you mention to Mr. Yung the fact that you had given that card to Mr. Michelson?

A. I did.

Q. And did Mr. Yung give you instructions with respect to that card?

A. He did.

Q. That same day, Friday, July 19, 1946, were you at your home between the hours of 5:30 and 6:30?

A. I was.

Q. And some time around 6 o'clock did you receive a telephone call?

A. I did.

Q. And did you answer the telephone yourself?

A. I answered the phone.

Q. When you answered the telephone——

The Court: I am not clear on what day this was.

Mr. Pittoni: This is on Friday, July 19th. You see that morning he talked to the other agents——

The Court: Yes, I know, and at 6 o'clock that night you got a call, did you?

The Witness: Yes, at my home.

Q. And you answered the phone?

A. I answered the phone, that is right.

Q. Did you recognize the voice?

A. I recognized the voice as Mr. Michelson.

Q. When you recognized the voice of Mr. Michelson what did you do?

A. I told him, "Just a second," and I called a neighbor of mine in to take the phone call, to tell Mr. Michelson that I was not available, and that he should take a phone [fol. 23] number where I would call Mr. Michelson on Monday morning.

Q. Did that neighbor call off the number as he was speaking to Mr. Michelson?

A. Yes, as he was speaking to him he called off the telephone number which I wrote on a slip of paper.

Q. I show you a green slip of paper which apparently is from a check book. Will you look at that?

A. This is the slip of paper and the phone number that I wrote down at the time this phone call was made.

Q. That evening, Friday, July 19, 1946, did you call that number back?

A. No, I did not call it back that evening.

Q. Did you do anything further on the Michelson case until the following Monday morning?

A. No, nothing at all.

Q. Now, Monday morning, July 22, 1946, what did you do?

A. On Monday morning I reported to the office of Agent Yung and I told him about this——

Q. Wait a minute. You reported——

A. I reported to the office of Agent Yung.

Q. Did you have a conversation with Special Agent Yung in relation to that conversation you had had that Friday evening?

A. I did.

Q. Did you receive certain instructions from Agent Yung?

A. I did.

Q. After you received these instructions from Agent Yung what did you do?

A. I called this phone number from the office of Agent Yung.

Q. Was that in the presence of Agent Yung?

A. In the presence of Agent Yung.

Q. And when you made the call were you able to talk to Mr. Michelson, on the first call?

A. I believe he wasn't in yet——

Q. Were you able to talk to Mr. Michelson the first time?

A. No, I did not speak to Mr. Michelson.

[fol. 24] Q. Did you try again later on in the morning?

A. I tried again later on, I again made a call in the presence of Special Agent Yung.

Q. What time was?

A. About 11.30 I believe.

Q. Are you sure it was 11.30 or a little later?

A. It was around noon, I don't remember the exact hour; it may have been 11.30 or 12 o'clock.

Q. At the time you made the second call which you say was around noon were you able to talk to Mr. Michelson?

A. Yes, I spoke to Mr. Michelson.

Q. And what number did you call?

A. I called Canal 6-8640.

Q. Is that the same number that appears on this slip of paper?

A. I believe that is the number.

Mr. Pittoni: I offer the paper in evidence with the telephone number Ca—6-8640.

Mr. Castellano: I object to it as not being admissible.

The Court: Not what?

Mr. Castellano: The paper made here by this witness, the notation on that paper, would not be binding on us.

The Court: Sustained. Mark it for identification.

(Marked Government's Exhibit 3 for Identification.)

Mr. Pittoni: If it please your Honor, may I discuss that point?

The Court: Well, if it is to be at length you had better step up here.

Mr. Pittoni: No, it isn't going to be at length.

The Court: All right.

Mr. Pittoni: He puts down the telephone number on that slip of paper, and then in calling back that same telephone number on Monday morning he talked to Mr. Michelson, he recognized the voice and talked to Mr. Michel- [fol. 25] son. I therefore contend that it is admissible in evidence now.

The Court: It is somewhat similar to a statement that is consistent with the statement that the witness makes on the stand, isn't it?

Mr. Pittoni: It is in corroboration of the statement.

The Court: I always believe statements consistent, prior statements, consistent with those made on the stand, are inadmissible.

Mr. Pittoni: Well, all right.

The Court: I refer you to the Rappy case, which was decided last month.

Mr. Pittoni: I am afraid I haven't read that one yet.

The Court: There are ways it can be made competent, for instance, if Mr. Castellano cross examines on it.

Mr. Pittoni: I would rather Mr. Castellano decide that himself.

Q. All right. Now, we are still on Monday, July 22, 1946. Tell us briefly what the conversation was between you and Mr. Michelson.

A. I spoke to Mr. Michelson asking him why he had called me on the previous Friday evening. He told me that he was still trying to get the balance of the money. He told me to call him back on the Friday following. That was the gist of the conversation on that date.

Q. He told you to call him back on Friday?

A. To call him back on Friday.

Q. After you finished this conversation over the telephone with Mr. Michelson, how much longer did you stay in the office of the Intelligence Unit?

A. I believe I went out to lunch shortly thereafter.

[fol. 26] Q. Am I correct in saying that between Monday, July 22nd, and Friday, July 26, 1946, you did nothing further on the Michelson case?

A. That is right.

Q. Did you have a conversation on Monday, July 22, 1946, with Agent Burke Yung in respect to that telephone conversation which you had with Solomon Michelson?

A. The one I had on that same day?

Q. That is right, that is still Monday, July 22nd.

A. I did.

Q. All right. Now, moving on to Friday, July 26, 1946, tell us what you did on that day in regard to the Michelson case.

A. On Friday morning I reported at the office of Special Agent Yung, and at some time during that morning I made a phone call to that same Canal 6 number.

Q. What was the number that you called that morning?

A. Canal 6-8640, I believe it is.

Q. When you telephoned that number, Mr. Kratter, were you able to talk to Mr. Michelson?

A. Yes. I recognized Mr. Michelson's voice when the party answered the phone, and the party said it was Mr. Michelson.

The Court: This is now the 26th of July?

The Witness: That is right, the 26th.

Mr. Pittoni: This is Friday, July 26th, your Honor.

Q. And what was the gist of the conversation between you and Mr. Solomon Michelson on the telephone that morning?

A. Mr. Michelson told me that he had succeeded in getting the $5,000 together, and that he wanted to meet me to give me the money. I told him that I would make arrangements for meeting him in some hotel room, and he objected very strenuously to meeting in a hotel room; he didn't like that type of arrangement; he was afraid he would get hurt, or some such fear seemed to enter his mind.

[fol. 27] I told him that the only reason I was taking the money from him was because he insisted, and that if he wouldn't do things the way I insisted and the way I planned I would drop the whole thing, because I told him I didn't want to get involved in that type of business in the first place.

Q. Was this conversation with Mr. Michelson in the presence of Agent Burke Yung?

A. That is right.

Q. And after you finished telephoning Mr. Michelson on this Friday, July 26, 1946, did you have a conversation with Agent Burke Yung in regard to what you and Mr. Michelson had said on the telephone?

A. Yes, I did.

Q. And thereafter you left the office of Mr. Yung, is that correct?

A. That is right.

Q. Did you do anything else on the Michelson case until the following Monday morning?

A. No, nothing at all.

Q. Now, let us move on to Monday, July 29, 1946. On that Monday, July 29, 1946, tell us what you did and what you saw and so forth.

A. On the morning of July 29th, that was a Monday morning, I reported to the office of Special Agent Yung. At about 10 o'clock I left the office of Special Agent Yung in the company of Agents Yung and Geary and Sherry, and Narcotic Agents Teats and Betts, and we proceeded to the St. George Hotel. We went to the third floor where we occupied rooms 31 and 36. Agents Teats and Betts proceeded to install a listening device in room 31, and a pick up device in room 36 and——

Q. May I stop you for a moment?

A. Yes, certainly.

Q. Where was room 36 in relation to room 31?

A. Room 36 was across the hall, about two or three doors down the hall.

Q. Now, continue.

A. At about 11 o'clock the installation was completed and we began making tests of it. At about 11.30 I made a phone call to Mr. Michelson at the Canal 6-8640 number. Mr. Michelson answered, I recognized his voice, and I told [fol. 28] him I was at the St. George Hotel, and he said he would come right over. I told him to take a taxicab. And that was the end of that conversation.

Shortly thereafter——

Q. Wait a minute. This telephone call you made to Mr. Michelson, was that in the presence of anybody?

A. That was in the presence of Special Agent Burke Yung in room 31.

Q. All right, go ahead.

A. Then while still in the room, shortly after the conversation Special Agent Yung in the presence of Agent Geary searched me, searched my bag and the entire contents of the room. Then they left me alone in the room some time after 11.30.

Q. Did Mr. Yung find any money on you?

A. Yes, I had some money in my wallet.

Q. About how much?

A. It was about $60, I believe it was.

Q. Now, you say Agents Yung and the other agents left you alone in room 31, is that correct?

A. Yes.

Q. What did you do after the agents left you?

A. I just sat there and waited to hear from Mr. Michelson.

Q. How long did you wait until you heard from Mr. Michelson?

A. About twenty minutes later, I think it was about five to twelve the phone rang and I recognized Mr. Michelson's voice. He said he was in the lobby of the hotel. I told him to come up to room 31, that I was in room 31.

A few minutes later there was a knock on the door. I opened the door and Mr. Michelson came in, and I closed the door after him. He dropped a package on a dresser or chifferobe, something like that that was in the hotel

room, and he sat down and I sat down. I asked him if he had the money, and he said, "Yes, it is in the bag over there." I took the bag, unwrapped it, and he took out a large number of five, ten and twenty-dollar bills, and he said, Mr. Michelson said, "There is $5,000 there." I [fol. 29] made a quick count of the bills and satisfied myself that there was approximately $5,000 in the package. Then we had a conversation right after that.

I asked Mr. Michelson what he wanted me to do for this money, and he told me that he wanted me to turn in a report which would indicate that he owed about $1200 on his 1943 tax return and about $900 on his 1942 return. He said that was all he wanted me to do.

Then I told him, "You understand the only reason I am doing this is because you insist upon it, isn't that so?" And he said, "Yes, that is right."

After that we had some unrelated conversation, and he offered me a copy of his 1942 return which I had requested before of him, and I told him I didn't need it at that time and I returned it to him.

Shortly after that I said, "Well, I think that is all." We got up, and Mr. Michelson and I walked over to the door. I opened the door, and we stepped out into the hall. I had the package of money under my left arm. Whereupon Special Agents Yung and Geary presented themselves to Mr. Michelson and took him back into the room. They asked Mr. Michelson if that was his money, and he said yes. They asked me how much there was, and I said $5,000. They they asked him what he wanted me to do, what he was going to do with this money, and he said he would tell it to the proper authorities.

The Court: What?

The Witness: He said he would tell it to the proper authorities.

Q. Then what happened after that?

A. Then we left the hotel and we went to the office, to your office, as a matter of fact, and Mr. Michelson was brought there too.

Q. You came over, you say, over to my office?

A. That is right.

[fol. 30] Q. Did you come into my room together with the special agents and Mr. Michelson?

A. I did for a couple of minutes, and then you asked me to leave.

Q. Who asked you to leave?

A. You or Agent Yung.

Q. Now, Mr. Kratter, do your daily reports show in detail the activities on each day?

A. They show the case that we are activity engaged on——

Mr. Castellano: Objected to. The documents speak for themselves, your Honor.

The Court: Sustained.

Mr. Pittoni: All right, your witness.

The Court: We will take a ten-minute recess.

Cross-examination.

By Mr. Castellano:

Q. Mr. Kratter, you said something about looking up the address of the defendant on July 15th and 16th.

A. That is right.

Q. Does the tax return have an address at the top of it?

A. It does.

Q. Did you find an address at the top of the tax return of Mr. Michelson?

A. I did.

Q. What was that address?

A. It was an address in Brighton Beach, Brooklyn.

Q. Do you recall the address?

A. I don't recall the exact address.

Q. Was it his place of residence?

A. I don't know what it was. I presume it was.

Q. Did you go down there?

A. No. I wrote a letter to that address. I wrote two letters to that address and they came back unknown.

Q. You don't recall what the address was?

A. Something like 3162 Brighton 6th Street.

Q. Brooklyn, New York?

A. Brooklyn, New York.

Q. Did you look up any other return of the defendant to find out the address of the defendant?

[fol. 31] A. I called up the control room for the 1944 and 1945 returns and they were filed under the same address.

Q. The same address?

A. That is right.

Q. What was the date you say you visited his premises at 74 Bowery?

A. On July 16th.

Q. At what time of the day?

A. At about 3.30 in the afternoon.

Q. And you remained there about twenty minutes?

A. Fifteen or twenty minutes.

Q. And you returned there the following day?

A. That is right.

Q. What time did you arrive on July 17th?

A. At about eleven.

Q. In the morning?

A. Eleven in the morning. That is right.

Q. Will you decribe the premises of the defendant at 74 Bowery?

A. 74 Bowery is a large store. Various sections of the store are rented out to jewelry dealers and each dealer occupies a certain part of the store. The store is not sectioned off. All the dealer has is a showcase and he stays behind the showcase, which usually allows room for a safe and a desk and merchandise and other items a dealer may need. There is also a space behind the showcase to walk back and forth and open the showcase and to deal with the customers.

Q. As you went to the main entrance of the store at 74 Bowery in the Borough of Manhattan you see a large number of counters and showcases

A. That is right.

Q. And the defendant Michelson occupied one of these counters or showcases?

A. He had two counters; one in the front and one adjoining running alongside the side of the store.

Q. Both together?

A. Both together.

Q. In the corner?

A. In the corner of the store at the front.

Q. As you enter?

A. That is right.

[fol. 32] Q. As you enter is there a small gate between the showcase and the wall?

A. Yes, there is a gate closing off Mr. Michelson's section from the center of the store.

Q. That gate is about 3 feet high?

A. Yes, that gate is about 3 feet high.

Q. And you can stretch your arm over and touch a lock to open it?

A. I don't know whether there is a lock there, but you can reach over it very easily. It is only about 3 feet high.

Q. On the 17th did you go through that gate in the morning?

A. On the 17th I went through that gate.

Q. And did you give Mr. Michelson this card bearing your name and address, your Treasury card?

Mr. Pittoni: Object to the question. Will you kindly state when?

Q. On July 17th at about 11 A. *M.*

A. Not on July 17th.

Q. You tell us the date you gave Michelson that card?

A. I gave Mr. Michelson this card on July 16th when I first met him.

Q. Has that got an inscription there "Defendant's Exhibit A"?

A. That is right.

Mr. Castellano: I offer it in evidence.

Mr. Pittoni: No objection.

(Card received in evidence and marked Defendant's Exhibit A.)

Q. After you gave the defendant your card did you sit down at a table behind the counter?

A. You mean on the 17th?

Q. On the 17th, yes, the second day you were there.

The Court: Wait a minute. When did you give him a card?

[fol. 33] The Witness: On the 16th.

The Court: Which day are you talking about?

Q. On the 17th you went to the premises about 11 A. M.?

A. That is right.

Q. Did you go through the gate?

A. On the 17th I went behind the counter through the gate.

Q. Did you sit at a table?

A. That is right.

Q. Did you ask the defendant for some books?

A. I asked him for his books and records.

Q. Did he hand you a ledger?

A. He handed me a general ledger and a cash book.

Q. At the time he handed you the general ledger did you make a statement to him, "This will cost you $800"?

A. I never made any such statement.

Q. Did you demand $800 in any form at that time?

A. I never made any such demand. I never demanded any money from him at any time.

Q. How long did you work in the store on the morning of July 17th?

A. About two hours.

Q. Did the defendant furnish you with the books and records that you asked for during that period?

A. He did.

Q. Did you telephone to the defendant's accountant during that period?

A. No, not on that date.

Q. Not on July 17th?

A. No.

Q. Did you telephone to him on July 16th?

A. On July 16th I did.

Q. Was that in the presence of Mr. Michelson?

A. Yes.

Q. Tell us what you told the accountant?

A. I told the accountant I was an Internal Revenue Agent and I had been assigned the tax return of Mr. Michelson. I told him I was calling from Mr. Michelson's place of business and that Mr. Michelson asked me to call him to get his approval so that I could examine the books.

[fol. 34] At what time did you leave the store on July 17th, to go to lunch?

A. About 1.15.

Q. And Michelson went with you?

A. Yes.

Q. And that was directly across the street from Michelson's store?

A. That is right.

Q. And that is a cafeteria where you serve yourself?

A. That is right.

Q. How long did you remain in the restaurant with Michelson?

A. About a half an hour.

Q. And you both sat together?

A. That is right.

Q. Was it crowded?

A. Well, it was not crowded, no.

Q. As I recall your testimony on the last trial, you stated it was not crowded, it was rather late.

Mr. Pittoni: He is not using those minutes properly, your Honor.

Mr. Castellano: All right. Forget it.

Mr. Pittoni: We don't care what he remembers.

Q. At the last trial, on December 9, 1946, were you asked these questions and did you make the following answers:

"Q. And it was quite a crowded lunchroom? A. Not too crowded. It was pretty late.

"Q. How many people sat at a table? A. Well, the tables were arranged in rows and Mr. Michelson and I sat at a table alone."

Were you asked those questions and did you make those answers?

A. That sounds like what I said.

Q. Was it late?

A. It was 1.15 or shortly thereafter.

Q. Regular lunch time, isn't it?

A. It was slightly after lunch time.

Q. How many people would you say were in the restaurant at the time?

A. I did not make a count.

Q. All the tables were filled?

A. Well, I will say most of them were. Some people were standing, too.

[fol. 35] Q. How much was the bill at the restaurant for the food?

A. The bill was about 80 or 85 cents for both checks.

Q. Who paid the checks?

A. Mr. Michelson.

Q. While you were in the restaurant did you have any conversation with reference to Michelson's vacation having terminated that day?

A. Mr. Michelson made a statement that he had just returned from his vacation.

Q. Did he tell you that the whole jewelry district there on Canal Street took a vacation at the same time?

A. That I don't remember.

Q. You left the restaurant and then you started to walk in the direction of Christie Street, is that correct; toward the park?

A. Well, we ended up in the park. We didn't start walking directly towards the park. I am not too familiar with that neighborhood.

Q. How many blocks did you walk before you landed in the park?

A. About three or four, I would say.

Q. Is this a very large park on a very wide street?

A. That is right.

Q. Are there regular park benches in the park?

A. Yes.

Q. And did you sit on a park bench?

A. Yes, we sat on a park bench.

Q. And Michelson sat alongside of you?

A. That is right.

Q. Did you demand any money while you were sitting on the park bench?

A. I did not.

Q. Did you demand $1,000 from Michelson?

A. I never demanded any money from him.

Q. Were you sitting on the park bench with Michelson for about one hour?

A. No.

Q. How long did it take you to walk from the park bench to Michelson's place of business?

A. Well, at the rate we were walking it would take about eight or nine minutes.

[fol. 36] Q. So you were in the restaurant for about a half hour?

A. That is right.

Q. And it would take you eight or nine minutes to return from the park to Michelson's store?

A. That is right.

Q. And altogether you were out about one hour and three-quarters; is that correct?

A. That is right.

Q. Well, that would leave you with a full hour in the park?

A. Approximately, including the walking time.

Q. It would leave you fifteen minutes of walking time, wouldn't it?

A. Yes, that is right.

Q. Did he attempt to hold you in any form or in any manner while you were in the park?

A. No, he did not.

Q. Did he have his hand on your sleeve?

A. No, I don't believe he did.

Q. Did he have his hand on your arm?

A. No.

Q. During this period were you expecting the accountant to come into Michelson's store?

A. Prior to 1 o'clock I was expecting him. Mr. Michelson had told me he would be there at twelve when I saw him on the previous day, on the 16th.

Q. Now, you did consent to take $1,000 at one period, did you?

A. That is right.

Q. And will you tell us when that was?

A. That was just before we left the park to return to his place of business.

Q. That was on July 17th?

A. That was on July 17th; that is right.

Q. Wednesday?

A. That is right.

Q. Just what expressions did you use in giving the consent?

Mr. Pittoni: I object to the form of the question.

Q. Tell us what was said.

Mr. Pittoni: What was said; not a mental reaction.

[fol. 37] Q. Tell us what you said.

A. I simply said, "O.K."

Q. That you would take the money?

A. That is right.

Q. Did you take any money?

A. I did not.

Q. After you said, "O.K., I will take the money," did you return to 74 Bowery?

A. That is right.

Q. And you did some more work?

A. That is right.

Q. Did you upon your return demand $800 while you were in the store?

A. I did not.

Q. It was then that you claim that $800 was dropped at your feet?

A. A package was dropped at my feet. Mr. Michelson said $800 was in the package.

Q. Could you see money from the package?

A. No.

Q. Was it entirely covered?

A. It was entirely enclosed.

Q. And you picked up this money from the floor before you left the premises?

A. As I left I picked it up and returned it to Mr. Michelson.

Q. You say it was laying there for a couple of hours or at least an hour?

A. An hour or so, under my desk.

Q. Was it near your bag?

A. No, don't believe so. It was near my feet. The bag was on the other side of the desk.

Q. Did you have your foot on it at any time?

A. No, I did not.

Q. How far away from your feet was the package?

A. Well about a foot, I would say. About 12 inches.

Q. And before you left, around 4 o'clock, you picked up this package?

A. That is right.

Q. Could you feel that there was money it it?

A. I don't know if it is possible to feel there is money in a package when it is wrapped around with a piece of paper. I couldn't feel it and say there was money in it.

Q. You took that——

A. And gave it back to Mr. Michelson.

Q. Did you hand it to him?

A. No. I put it on a shelf behind the counter.

[fol. 38] Q. And you said, "I don't want it"?

A. "I am not interested" I told him.

Q. Did the tax return show the name of the firm where he kept his brokerage account?

A. No, it did not.

Q. On July 17th it was a very hot day?

A. It must have been, in the middle of July.

Q. Were you in the restaurant and in the park in your shirt sleeves on that day?

A. It could be possible. I might have been.

Q. Did you have a conversation with Michelson with reference to your wife and child? Will you tell us what that was?

A. I didn't have any conversation about my wife and child.

Q. Did you mention those words at the first trial?

A. The only connection in which I mentioned it was when I told Mr. Michelson that I didn't want to get involved with him, that I had a wife and child to worry about. That was about the only connection in which I might have mentioned it to him.

Q. When was that said? Was it on the 17th?

A. That was said after I left his store on the way home.

Q. On the 17th of July?

A. On the 17th. That is right.

Q. You were leaving his store about 4 P. M. on July 17th?

A. It was after 4. It was almost 4.30. About 4 o'clock I finished my examination and shortly thereafter I attempted to leave the store.

Q. You completed your work at four?

A. That is right.

Q. And you went toward the gate at his counter to leave and that is the point where you say he held you?

A. He did not hold me. He barred the way out to the gate.

Q. He blocked the exit?

A. That is right.

Q. Just standing in front of the gate?

A. Yes.

Q. You were on the inside and Michelson was on the outside?

A. He was on the inside, too.

[fol. 39] Q. Both of you were on the inside?

A. That is right.

Q. But he was standing up against the gate and he would not let you go through?

A. I did not try to force my way through. I just stood there.

Q. You did not want to stand there, did you?

A. I told him I wanted to leave.

Q. But you did stand there for about twenty minutes?

A. About twenty minutes; that is right.

Q. And during the entire period of that twenty minutes you wanted to leave the premises all the time?

A. Certainly.

Q. After you left the premises on July 17th after 4 P. M. you say the defendant followed you out to the street?

A. That is right.

Q. Talking to you?

A. Yes.

Q. Was something said about $5,000 on the street?

A. He asked me if I would take $5,000.

Q. That is after you left the store?

A. As we were walking down the street.

Q. How far away from the store were you?

A. About two and half blocks.

Q. You say the figure reached $5,000?

A. That is right.

Q. And were you walking towards your office?

A. No; towards the I. R. T. subway.

Q. Is that away from 253 Broadway or toward 253 Broadway?

A. My office is not at 253 Broadway.

Q. Is it going towards 165 Broadway or away from it?

A. 165 Broadway is southwest——

Q. Were you going downtown?

Mr. Pittoni: Let him finish.

A. I was going west along Canal Street towards the I. R. T. subway station.

Q. You did say at some point on the street as you were walking with him you would accept $5,000?

A. That was the end of the conversation.

[fol. 40] Q. Did you say that or not?

A. I did.

Q. And that is after you left his place of business?

A. That is right.

Q. And you were on your way home or to your office?

A. That is right.

Q. I show you Government's Exhibit 1, which is your card bearing a telephone number written in pencil, Gr.

3-4372, and ask you when did you give that card to the defendant (showing card to witness)?

A. I gave this card to the defendant just before we parted, while we were standing out on the street.

Q. That is on July 17th?

A. That is on July 17th.

Q. After 4 P. M.?

A. That is right.

Q. Where did you write the number? What did you lean on?

A. I believe I leaned on my bag.

Q. With your knee up on the sidewalk?

A. That is right.

Q. In the middle of the street, or in the middle of the sidewalk?

A. On the side of the street. Not in the middle of the sidewalk.

Q. And you gave this card to Michelson?

A. That is right.

Q. With your home telephone?

A. That is right.

Q. You saw this card before, didn't you, here last December?

A. Yes, sir.

Q. I produced this card, didn't I, on December 8th or December 9th?

Mr. Pittoni: I object to that.

The Court: Overruled.

Q. Well, did I or didn't I? Did I produce this card at the first trial?

A. I guess you did.

Q. And that was the first time you saw this card since you gave it to Michelson?

A. That is right.

[fol. 41] Q. Did you make any report to your office immediately after you left Michelson's place?

A. No.

Q. Did you make any report on July 17, 1946?

A. Not to my office, no.

Q. Did you telephone to anybody in your office with reference to this matter?

A. No.

Q. Did you get in touch with any of your superiors on July 17th?

A. Not on July 17th.

Q. You say you did talk to an older agent named Rubinstein?

A. That is right.

Q. And that was on July 18th?

A. That was the following day.

Q. That is a Thursday; right?

A. That was on Thursday; that is right.

Q. Thursday, July 18th. Who was Rubinstein?

A. Rubinstein is one of the older agents in my squad.

Q. He was there a longer period of time?

A. That is right.

Q. When did you talk to him for the first time with reference to this matter?

A. On July 18th.

Q. At what time?

A. About 3 o'clock in the afternoon.

Q. Was that the first time you spoke to anybody about the case in your office?

A. Yes, sir.

Q. Where was Rubinstein when you spoke to him? Was he in the office or was he outside?

A. He was in the office.

Q. Did you report to the office on July 18th at 10 o'clock or 9 o'clock?

A. No.

Q. What time did you report there?

A. About 8.30.

Q. 8.30 in the morning?

A. That is right.

Q. How long did you remain in your office on July 18th?

A. About a half an hour.

Q. Did you make up a sheet for the day as to where you would be that day during that half hour?

A. That is right.

Q. And that is in accordance with your regulations, isn't it?

A. I beg your pardon?

[fol. 42] Q. Is that in accordance with the regulations of your department?

A. Will you repeat your prior statement, please?

Q. You make up a sheet or a form where your superiors can tell from hour to hour where you are during the day?

A. Not from hour to hour. They know what assignment we are working on.

Q. You did not make up a daily sheet before you left the office?

A. Showing what?

Q. Showing where you will be during the day.

A. We report what cases we will be working on during the day.

Q. During the current day?

A. That is right.

Q. So that someone in the office will know where you are at all times during that day; right?

A. Well, they will know what cases we are working on. The intention is not to know where we are any minute of the day, because we may leave and go on another case for some reason.

Q. They can tell from this sheet at what address you are working?

A. That is right.

Mr. Pittoni: I object, your Honor. It has already been answered.

Q. Did you put anything on the sheet that morning with reference to this bribe?

Mr. Pittoni: I object to that. He himself said the sheets speak for themselves.

The Court: I will let him answer, but Mr. Castellano is now making competent what I ruled out before, if he is aware of that.

Mr. Castellano: I withdraw the question.

Q. It was not until 3.30 on the day of July 18th that you spoke to anybody connected with your department with reference to this case?

A. At approximately that time.

[fol. 43] Q. And at that time you had already given Michelson your personal Treasury card with your home telephone number on it?

A. That is right.

Q. And it was on the following day, July 19th, that you met Agent Yung?

A. Right.

Q. And from that time on you worked under his instructions?

A. Right.

Q. He told you about every move that you were to take?

A. Regarding Mr. Michelson's case, that is right.

Q. And did he also tell you what you should say to Michelson when you called him up?

A. That is right.

Q. And did he also tell you what you should say to Michelson when you get to the hotel?

A. That is right.

Q. And when you were talking with Michelson at the hotel you knew the hearing device had been set up?

A. That is right.

Q. And you carried out your instructions from Agent Yung when you were at the hotel?

A. That is right.

Q. And everything you said to Michelson was said by you at the request of Agent Yung?

A. No, not everything.

Q. Not everything?

A. No.

Q. Was most of your conversation with the defendant made in the manner and under the direction of Agent Yung?

A. That is right.

Q. You had a telephone conversation on July 26th, which was a Friday, when Mr. Yung was present; you called up the defendant; do you remember that?

A. I do.

Q. During the course of that conversation do you recall saying the following to the defendant: "I told him the only reason why I had agreed to take any money was because he insisted upon it."

A. That is right.

Q. And you said that after you had made your arrangements with Agent Yung?

A. That is right.

Q. And he told you just what to say over the telephone?

A. That is right.

[fol 44] Q. And he was present when you were saying it?

A. That is right.

Q. And at the hotel you said to the defendant: "You understand I am only doing this because you insisted on it"; is that right?

A. That is right.

Q. And the defendant, you say, answered, "Yes"?

A. Right.

Q. And that was also in accordance with your instructions from Agent Yung?

A. That is right.

Q. When you were appointed in November, 1945, did you take an examination?

A. Yes.

Q. Was it written or oral?

A. Oral.

Q. Who examined you?

A. Three representatives; one from the Civil Service Commission, one from the office of the Internal Revenue Agent and one from the office of U. S. Intelligence.

Q. Did they question you with reference to income tax matters?

A. Whose income tax matters?

Q. At this examination were you examined with reference to your qualifications on tax matters?

A. No.

Q. Just on your personal qualifications?

A. No, on that only.

Q. You were never asked any questions with reference to your knowledge about income tax matters?

A. No, we went to a school where we were taught about income tax matters.

Q. You went to school after you were appointed?

A. That is right.

Q. Where did you go to school?

A. At Columbia University.

Q. Does the Treasury Department run that school?

A. That is right.

Q. For how many weeks did you go to school?

A. About ten weeks.

Q. So you took a ten-weeks course?

A. That is right.

[fol. 45] Q. After your appointment, were you paid during those ten weeks?

A. We were.

Q. What was your initial salary?

A. $70 a week.

Q. Would it average about $3690 for the first year?

A. That is right.

Q. At the present time you receive about $4300 per year?

A. Yes, something like that.

Q. During your instructions at Columbia did you receive any instructions on renegotiation of war contracts?

A. Yes.

Q. And its relationship to income tax matters?

A. That is right.

Q. Did you receive instructions on bribery cases?

A. No.

Q. None whatever?

A. No.

Q. Did you ever have a bribery case before?

A. No, never did.

Q. This is the first time?

A. That is right.

Q. At this time you were in the service about six months?

Mr. Pittoni: I object to the question, not specific enough. At this time, what does that mean? What time is that?

Q. You were appointed November 8, 1945?

A. That is right.

Q. And this arrest arose July 29, 1946, correct?

A. Right.

Q. Are you required to make a daily report of your activities to your office?

A. We are required to make a daily report of the cases that we are actively engaged on.

The Court: And that is all, is that right?

The Witness: That is right.

[fol. 46] Q. Does the daily report set forth the time of arrival and the time of departure from the places where you are on that day?

A. No, it does not.

The Court: How could it, Mr. Castellano?

Mr. Castellano: I will let the exhibit speak for itself.

The Court: I do not care what they have on the paper. How could he possibly be able to say the minute he arrived at taxpayer No. 1's place and the minute he had left tax-

payer No. 1's place, and the minute he arrived at taxpayer No. 2's place and the minute he had left there? I mean, is it important?

Mr. Castellano: No.

Q. I will show you Government's Exhibit 2. Those are daily reports for July 16, 1946, and July 17, 1946, is that right?

A. That is right, they are.

The Court: Are these rendered after the service?

The Witness: These are rendered on the morning of the day following on which they are a report of.

The Court: Those are in retrospect?

The Witness: Also in anticipation. We mark down the appointments that we have for the current day.

The Court: I am not clear on that. This report for July 16th, which is part of Government's Exhibit 2 is that prepared on the morning of the 16th?

The Witness: On the morning of the 17th. You will notice the upper half—it is in two parts. The upper half reports the activities on that day, on the day indicated on the top; and the lower half indicates the anticipated activities for the current day, in other words, the appointments that we have.

The Court: All right.

[fol. 47] Q. Are these the two same exhibits that I introduced in evidence at the trial on December 10th?

Mr. Pittoni: I object to that.

The Court: What reason is there for that?

Mr. Castellano: I just want to show that at the first trial I demanded them and offered them.

The Court: I do think that we are rather overemphasizing the fact that there has been another trial. I have already told the jury that it isn't any concern of theirs after all. Is that clear, members of the jury? All right.

Mr. Castellano: But I do want to show that at the other trial——

The Court: Mr. Castellano wants me to tell the jury that Mr. Castellano offered these papers in evidence at the last trial.

Now, does that satisfy you, Mr. Castellano?

Mr. Castellano: Yes, your Honor.

The Court: Now, can we try this case?

Mr. Castellano: Yes, your Honor.

Q. I show you this yellow sheet with the telephone number in pencil Gr. 3-4372, and ask you if you wrote that number there?

A. I did.

Mr. Castellano: I offer it in evidence.

Mr. Pittoni: No objection.

(Marked Defendant's Exhibit B in evidence.)

Q. Did you ever give your home telephone number to a taxpayer whom you were investigating on any other occasion?

A. No.

Q. This is the first time?

A. That is right.

Q. At the time you gave it to Mr. Michelson you were not acting under any instructions from Mr. Yung?

A. Not from Mr. Yung, no.

[fol. 48] Q. You examined the 1942 and 1943 returns of this defendant, correct?

A. That is correct.

Q. And you only had the original of the 1943 return?

A. That is right.

Q. Did you have the original of the 1942 return available to you?

A. Well, it probably was available; it required to be requisitioned. But ordinarily we do not requisition a 1942 return if it isn't given to us with the 1943 return.

The Court: If it is not what?

The Witness: We do not ordinarily requisition the 1942 return if it does not accompany the 1943 return when it is assigned to us, because of certain techincal changes in the income tax law to be "Pay as you go" basis. That was the year that the change was made, and 1942 and 1943 were combined into one taxable year.

Q. If you were going to examine one you would have to examine the other?

A. That is right, both years were examined but the tax was computed by making a combination of the two years for the one year 1943 to put it on a pay as you go basis.

Q. And you found the defendant Michelson had paid his tax for 1942 and 1943?

A. As reported on his tax return.

Q. As far as you know he didn't owe a dollar to the Government?

A. Officially there is no record as far as I know.

Q. At one time you worked for Hafer, Baran & Golub, certified public accountants?

A. That is right.

Q. And you left that firm to work for the Government?

A. That is right.

Q. Tell us what your salary was while you were employed by Hafer, Baran & Golub for the year 1945?

A. For the year 1945 I was receiving $65 a week.

Q. Did you receive a gross of $7500 for that year?

A. Pardon me, it was $75 a week for 1945.

[fol. 49] Q. Did you receive a gross income from this firm for the year 1945 of $7500?

A. That is right, including expenses, yes.

Q. Did you receive a gross income of $5,000 a year for the year 1944?

A. That is approximately correct.

Q. You are married?

A. I am?

Q. Does your wife work?

A. Not now, no.

Q. She did work until June, 1945?

A. June, yes, approximately June, 1945.

Q. And she hasn't worked since?

A. No.

Q. Did you maintain charge accounts in 1945?

A. We had one I believe.

Q. Did you maintain a charge account at Altman's?

A. That is right.

Q. Did you maintain a charge account at Best & Company?

A. I believe that was opened in 1946.

Q. When did you close it?

A. They are still open.

Q. Have you used them?

A. Certainly, they are used monthly.

Q. In 1946?

A. That is right; particularly Best & Company.

Q. Best & Company?
A. That is right.
Q. You discontinued the other account?
A. No, it is actively used to this day.
Q. Where do you reside?
A. At 20th Street and Fourth Avenue
Q. You call that Gramercy Park?
A. That is right, No. 8 Gramercy Park.

Mr. Castellano: That is all, Mr. Kratter.
The Court: Any redirect?
Mr. Pittoni: Just a few questions, your Honor.

[fol. 50] Redirect examination.

By Mr. Pittoni:

Q. Mr. Castellano asked you whether your wife was working any more and you said no. When did she stop working?
A. In June, 1945.
Q. For what reason?
A. Well, she just stopped working.
Q. When was your child born?
A. In May, 1946.
Q. Mr. Castellano asked you a question about whether you knew whether there was any money due and owing by the defendant on his income tax. From your examination of July 17, 1946, could you tell whether there was some money due and owing to the United States Government on his income tax?

Mr. Castellano: I object to that, your Honor.
The Court: Sustained.
Mr. Pittoni: He asked the question.
The Court: I know. I sustain that objection, members of the jury; because we are not trying the case of whether this man does or does not owe tax, and it does not lie in the mouth of either counsel to argue that he does or he doesn't. Is that clear? And neither of them is going to argue to that effect.

Mr. Pittoni: May I respectfully move to have Mr. Castellano's question stricken out along that line, may it please your Honor?
The Court: I strike it.

Mr. Pittoni: Thank you.
The Court: With exception to the defendant.

Q. Is there any particular reason why you told Mr. Michelson that you would accept $1,000 when he offered $1,000?

Mr. Castellano: I object to that.
The Court: Sustained.

[fol. 51] Q. Is there any particular reason why you said you would accept the $5,000 when he said he would offer you $5,000?

Mr. Castellano: The same objection.
The Court: Sustained.
Mr. Pittoni: That is all.
The Court: All right, step down.

(Witness excused.)

The Court: Members of the jury, we will take a recess until 10.45 on Monday morning, and you will please as I told you not discuss the case amongst yourselves or try to form any opinion, it is too early.

(Adjourned to Monday, January 6, 1947, at 10.45 o'clock A. M.)

Brooklyn, New York,
January 6, 1947.

APPEARANCE: (As before noted.)

Trial Continued

The Court: I would like to take this opportunity to say to the jury that by reason of certain personal considerations if we do not finish this case today, when we recess today we will recess until Wednesday morning. So that you will have tomorrow off and you may make such arrangements today as to get the most out of it.

All right, Mr. Pittoni.

[fol. 52] ALVIN E. BETTS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Pittoni:

Q. Mr. Betts, you are connected with the Narcotic Bureau?

A. Yes, sir.

Q. During the course of your duties do you from time to time set up or install what we call listening devices?

A. Yes, sir.

Q. And on the 29th day of July, 1946, did you accompany Agents Yung, Geary, Sherry and others to the Hotel St. George, Brooklyn?

A. I did.

Q. Was that the morning of July 29, 1946?

A. Yes, sir.

Q. Tell us what you did after you got to the Hotel St. George.

A. I went up to Room 36 with the listening device and the receiver and we went to Room 31 and installed a listening device. We went back to Room 36 and tuned in the receiver and Agent Teats and Agent Kratter went to Room 31 and had a conversation. I could hear the conversation on the receiving device. We had it all set up for operation. Then there was a phone call made——

Q. Wait a minute now. You had the listening device set up and you say you tested it?

A. Yes, sir.

Q. After it was tested did Agent Teats come back into Room 36?

A. Yes, sir.

Q. The way it was set up while in Room 36 could you hear the conversation which was going on in Room 31?

A. Yes, sir.

Q. Was that the only room in which conversation could be heard from Room 36?

A. Yes, sir.

Q. What time of the morning was this, Mr. Betts?

A. We arrived at the St. George about 10.30, around 10.30. We had the set ready for operation around 11 o'clock, I would say.

Mr. Pittoni: Your witness.

[fol. 53] Cross-examination.

By Mr. Castellano:

Q. Mr. Betts, was there any recording device set up in Room 36?

A. Recording device?

Q. Yes; a phonograph record.

A. No, sir.

Q. Just a loudspeaker?

A. Yes, sir.

Q. Did you receive your instructions as to what to do from Agent Yung?

A. I don't receive any instructions from Agent Yung. I work for the Bureau of Narcotics and we just operate the set. We have no other duties to perform.

Q. But you went over to the hotel with Agent Yung?

A. That is true, yes.

Q. And Agent Yung is with the Treasury Department?

A. That is right.

Q. And your services were being borrowed by the Treasury Department on this occasion?

The Court: He is in the Treasury Department.

Q. I mean the Income Tax Division of the Treasury Department?

A. We were being borrowed. We were to set up the listening device and receiving set and operate it.

Q. When you got over to the hotel to Room 31 and Room 36 did Mr. Yung tell you what to do?

The Court: It is perfectly obvious what the fact is, I think. (Addressing witness) You knew you were going there to set up a listening device; is that right?

The Witness: Yes, sir.

The Court: And you had been given some instructions from your superior to that effect; is that right?

The Witness: Yes, sir.

The Court: And Mr. Yung did not tell you what to do or how to do it, did he?

[fol. 54] The Witness: No, sir.

The Court: You knew that; you have been doing it for many years, have you?

The Witness: Yes, sir. If he knew how to do it he would not require me to do it.

Q. You set up a receiving device under a pillow, didn't you?

A. We put a listening device on the head of the bed and put a pillow on top.

Q. Did you do that at the suggestion of Mr. Yung?

A. No.

Q. Did you set up a table near the listening device?

A. Near the listening device? Yes.

Q. Did you pull a chair over near the table?

A. Yes.

Q. Did you do that at the request of Mr. Yung?

A. No, sir.

Q. At the request of Agent Kratter?

A. No, sir.

Q. You set that up yourself?

A. I didn't set it up. Agent Sherry put the table there and the chair himself. I didn't have anything to do with it.

Q. The chair was placed so that someone would sit there and speak into this listening device?

A. No, sir.

The Court: The table and chair were put there so that you could take notes?

The Witness: Yes, sir. You could stand in any part of that room and hear the conversation from the listening device.

Q. Did you set up two chairs near the listening device?

A. No.

Mr. Pittoni: May I interrupt? Which room is Mr. Castellano talking about?

Mr. Castellano: Room 31.

[fol. 55] The Witness: As soon as I set up the listening device in 31 I went out of the room. I had nothing to do with placing the furniture in any part of the room at all.

Q. All right.

A. Is that all, sir?

Mr. Pittoni: That is all.

EDWARD V. SHERRY, called as a witness on behalf of the United States, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Pittoni:

Q. Mr. Sherry, you are a Special Agent of the Intelligence Unit, is that correct?

A. Yes, sir.

Q. Treasury Department?

A. Yes, sir.

Q. On Monday, July 29, 1946, you also accompanied the other agents of the Government to the Hotel St. George?

A. Yes, sir.

Q. And were you in Room 36 on the morning of July 29, 1946?

A. Yes.

The Court: Isn't that July 19th?

Mr. Pittoni: No, your Honor. This is the last day now.

The Court: Oh, all right. You were there on that day?

The Witness: Yes.

The Court: In 36?

The Witness: In Room 36.

[fol. 56] Q. Were you present when this transmitting and listening device was being set up?

A. Yes.

Q. Afterwards, later on in the morning do you know whether Agent Kratter was left in Room 31?

A. Yes.

Q. Were you thereafter in a position to observe who went into Room 31 besides Mr. Kratter?

A. No, sir.

Q. While you were in Room 36 listening in did you take any minutes?

A. I took notes of the conversation.

Q. Are you a stenographer?

A. Yes.

Q. But you are an agent rather than a stenographer, is that correct?

A. Yes.

Q. Did you hear the conversation which went on in Room 31 by listening in Room 36?

A. Yes.

Mr. Castellano: Objection; it doesn't appear he knows who was in the room.

The Court: He didn't ask him that. He asked him did he hear a conversation. Objection overruled.

Mr. Castellano: Exception.

Q. Did you record that conversation?

A. Yes.

Q. Do you know who was in that Room 31 as you were recording the conversation?

Mr. Castellano: He has already answered that, your Honor.

The Court: I will let him ask it again. Do you know?

The Witness: Agent Kratter and a gentleman I later found out was Mr. Michelson.

The Court: How could you possibly find out it was Mr. Michelson?

The Witness: I had heard the conversation when Mr. Kratter called Mr. Michelson on the phone from that room and made the appointment, and I later found out it was Mr. Michelson.

[fol. 57] The Court: Did you later hear Mr. Michelson talk in your presence?

The Witness: No, sir.

The Court: You never did?

The Witness: No, sir.

The Court: All right. All you heard was a voice that you recognized as that of Mr. Kratter and another voice?

The Witness: Yes, sir.

The Court: Which so far as actual firsthand knowledge you couldn't identify?

The Witness: No, sir.

The Court: All right.

Q. Did you see whether Mr. Michelson went into Room 31?

A. No, sir.

Q. Did Mr. Michelson at any time tell you he had been in Room 31? This is Michelson now.

A. No, sir.

Q. Do you know who the other person was in Room 31 with Mr. Kratter?

Mr. Castellano: Objected to. He has already answered that.

The Court: Sustained: You have record evidence who was in the room at the time in the shape of the testimony of Kratter.

Mr. Pittoni: Yes, your Honor, but——

Q. About what time of the morning did you take these minutes that you heard from Room 31 in Room 36?

A. From my memory about 11.45. I could tell you exactly from my records.

The Court: All right, refresh your recollection from your records.

The Witness: Approximately 11.53.

[fol. 58] The Court: You commenced taking?

The Witness: That is right.

The Court: When did you cease taking?

The Witness: I am sorry, I have no record of it. It would be about, possibly ten minutes or maybe a little longer.

The Court: Were these notes that you hold in your hand the only conversation that you recorded on that day?

The Witness: Yes, sir.

The Court: And after you terminated the taking of those notes you dismantled the apparatus?

The Witness: Well——

The Court: Or the other agents did it in your presence?

The Witness: Yes.

The Court: All right.

Q. Were you able to take everything down which you heard in that room, Room 31?

A. I would say no.

Q. You say no, what did you take down, what parts?

A. At the start of it it was rather fragmentary. If I may say why, we had this set set up there with a table for me. The receiving set was at my left ear, and at the start of it I was getting it fragmentarily, and my left ear is not quite as good as my right ear. So finally I wound up down on the floor right in front of it, and I got it a little better. So there was possibly some parts that I did not get.

The Court: That was at the beginning of the conversation until you got yourself settled?

The Witness: That is right.

Q. But whatever you heard you put down in the stenographic minutes?

A. Yes.

[fol. 59] Q. And did you thereafter transcribe those stenographic minutes?

A. Yes.

Q. Have you got the transcript here in court today?

A. Yes.

Q. And this transcript is a true and correct transcription of the notes that you took on the morning of July 29, 1946?

A. Yes, sir; that is right.

Q. Have you got that transcript here?

A. Yes (producing paper).

Mr. Pittoni: I offer the transcript in evidence.

Mr. Castellano: It is highly improper, your Honor; it is objectionable on two grounds——

The Court: Don't say highly improper.

Mr. Castellano: Well, one ground is that the witness has testified he did not know who was in the other room and, secondly, it is not a true transcription——

The Court: In other words, your first objection is it is not connected with the defendant?

Mr. Castellano: That is right.

The Court: That I overrule on the basis of Kratter's testimony, with an exception to you.

Mr. Castellano: Exception. And, secondly, the witness has testified it isn't a complete record of what transpired in Room 31.

The Court: That objection I overrule on the ground that the weight of it is for the jury, with an exception to you.

Mr. Castellano: The record of the conversation is not admissible itself, if your Honor please.

The Court: Perhaps not. On that ground I sustain the objection. We will simply have the exhibit marked for identification.

(Marked Government's Exhibit 4 for Identification.)

[fol. 60] The Court: Now, will you take that exhibit, Mr. Sherry, and refreshing your recollection from it will you tell us what was said in that room?

Mr. Castellano: I further object on the ground that this conversation was not in the presence of this witness.

The Court: I overrule it on that ground.

Mr. Castellano: Exception.

The Court: If you are right on that you never can use this method of investigation.

Now, Mr. Sherry, refreshing your recollection from the transcript tell us what was said.

The Witness: First, Mr. Kratter said "Hello, O.K., come on up." I have that at approximately 11.53 A. M. Then at 11.56 A. M., the first thing I got was Mr. Michelson saying the word, "Complicated", and Mr. Kratter said, "What?"

Then Mr. Michelson said, "I say—complicated." Now there were some other things said. I just got down snatches of it at the start.

Then the next thing I heard was Mr. Michelson saying, "Then I took some money—taxes—do you get the idea—to give $200 and then I would put it in as income. Everything is there, you see." And another thing he said—"there's certain big amounts that he also gave me credit for that—in the beginning—you know this? I mean, that's the way." You see I am giving the conversation between Mr. Michelson and Mr. Kratter. There is probably some of Mr. Kratter's answers in here that I haven't got. I mean that is the way I got it.

"I mean, that's the way I do business. But naturally I don't want you to give me a thousand—you see, I have to give the Government—I don't know— they didn't take $850 I was supposed to give them. I mean I owed them $850. So they didn't take that out, and in my statement [fol. 61] I had a little bit more, and then I looked on the sheet. I seen on the sheet—I went to a friend of mine and I said, 'Help me out.'

"So what I say is this: I don't want you to hang yourself—I don't want to hang myself—that's what I want. I think I am being fair."

Then Mr. Kratter said, "You are the one that's paying."

"Michelson: You see, what he wants—that taxes—that's the 1942.

"Kratter: Well, this is too important——

"Michelson: No, he said it looks like——

"Kratter: I mean this isn't important the way it appears right now—it will come up later.

"Michelson: It doesn't have anything to do with this business right now?

"Kratter: As I told you before——

"Michelson: Well, listen——

"Kratter: You insisted that I do something.

"Michelson: Yes.

"Kratter: And in fact you wouldn't let me go unless I promised.

"Michelson: Well, naturally.

"Kratter: I tried to get away from you—I wouldn't touch it—I wouldn't handle it, but I figured I would work with you. On what you want to pay in excess of the sum—whatever you set it's got to be, but you set the figure.

"Michelson: Certainly. I figured we should make it like it's for both years. This is separate, only you should make it $1,200, and the other year $900—that would be very fair.

"Kratter: That's the whole story.

"Michelson: Yes. To tell you the truth, if they told me I wouldn't have to pay anything I wouldn't even start [fol. 62] it, because if it's not now, it's again somebody would put on the heat.

"Kratter: My examination was just a routine examination, but that's the chance you take—you know that.

"Michelson: You showed me you had a letter. What's the letter?

"Kratter: I couldn't locate you, so I sent the letter in which I asked you to bring your books and records up to my office. You see, I didn't know where your place of business was. I had to make a search of these second-hand dealers' licenses. You see, the letter I sent you came back unknown. I also sent a letter and it came back unknown at that address.

"Michelson: I told you what it is—the people I live with—they want that little apartment that I have, and what they did to me, it's a shame. They make me feel disgusted. When you are asked to leave the apartment, and you have to move out. They jumped me up the rate. I came back from the country—I was sick—it was, you

know, like manure, smelled up. They came over to me and said, 'Give me another $5, until that shortage goes off'—so I imagine whatever comes there they just ship back. But this is understood—the Government could always find me. Nobody wants to hide himself.

"Kratter: O.K.—well, that's all.

"Michelson: That's all. Here's your five.

"Kratter: O.K."

That is the end of the conversation with Michelson and Kratter.

Mr. Pittoni: Am I to assume that the document is not in evidence which he has just been reading from?

The Court: I sustain the objection to the introduction of the document, but the witness could use the document to refresh his recollection.

[fol. 63] Mr. Pittoni: All right, thank you very much. Your witness.

Mr. Castellano: May the record appear that the witness has read from the document?

The Court: Yes, let us be realistic about it. When you take stenographic notes that is about the only way you can refresh your recollection, isn't it?

Mr. Castellano: True.

Cross-examination.

By Mr. Castellano:

Q. Mr. Sherry, have you taken shorthand notes for some period of time? How long have you been taking shorthand notes?

A. Oh, since way back in 1907.

Q. Do you do it daily?

A. No, sir.

Q. How often do you take notes?

A. For some years back very infrequently.

Q. And when you refer to the name Michelson in your notes you do not know who that party is you have written down there as Michelson?

A. I do not write the names down in my notes, no, sir.

Q. When you refer to Michelson in there as you did several times——

A. Yes.

Q. You do not know who that party was that was talking on those occasions?

A. Only that I would hear a question answered, and I knew Mr. Kratter's voice, and I knew that the answer was in another voice——

The Court: Mr. Castellano means you are merely identifying this other voice as Michelson.

The Witness: Yes, that is right.

Q. But you do not know who that other voice is? You do not know who the other voice is?

A. My answer to that would be—may I answer that by saying I never saw Mr. Michelson until the morning that the first trial started?

[fol. 64] The Court: Yes, that answers it.

Mr. Castellano: Then I move to strike out the entire testimony of the witness.

The Court: I grant your motion—oh, you mean strike out the entire testimony?

Mr. Castellano: That is right.

The Court: I deny that. I deny that.

Mr. Castellano: Exception.

The Court: I thought you meant the last answer as irrelevant, something like that.

You see the situation, ladies and gentlemen. We have certain rules of law and I am required to rule as we go along. That does not mean I favor one side as against the other. I am ruling according to my likes on the admission of evidence.

Here is the situation: This man did not see Mr. Michelson and had never his voice before. All he heard was Kratter's voice, which he knew, and another voice. Now, it is for you to say whether that other voice belonged to Michelson, or it will be ultimately when the case is given in your charge.

Redirect examination.

By Mr. Pittoni:

Q. Mr. Sherry, Mr. Castellano asked you whether you had been doing stenographic work in the last few years, and your answer was infrequently in the last few years, is that correct?

A. That is right.

Q. But you also testified that you started doing stenographic work in 1907?

A. That is when I first started studying.

Q. Between 1907, and say more recent years, did you do much stenography?

A. Between 1907 and more recent years?

Q. Yes.

A. I did it every day from 1907 on up until just before the first World War, 1917. And then I was away from it for [fol. 65] a number of years, and I started back again just ten years ago. I took an examination for stenographer in the Federal Government, and I placed No. 1 with 104, 99 and five service points, in Pennsylvania. That was ten years ago.

Mr. Pittoni: That is all.

(Witness excused.

Owen Burke Yung, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Pittoni:

Q. Mr. Yung, you are a Special Agent of the Intelligence Unit, Treasury Department?

A. Yes, sir.

Q. And you have been such a Special Agent since 1941?

A. Since April 1, 1942.

Q. Previous to that you were with the Treasury Department; is that correct?

A. Yes, sir.

Q. Now, your duties as Special Agent, Intelligence Unit, are to investigate alleged violations of the Treasury laws?

A. Investigate and prepare for prosecution all frauds upon the Treasury Department.

Q. You are the agent in charge of the investigation of this case; is that correct, sir?

A. Yes, sir.

Q. Do you remember Agent Kratter being brought to your room in the Treasury office on Friday, July 19, 1946?

A. Yes, sir.

Q. Did you have a conversation with Mr. Kratter that morning?

A. I did, sir.

Q. And at that time did you give Mr. Kratter certain specific instructions?

A. I did.

[fol. 66] Q. The following Monday, July 22nd, 1946, did Mr. Kratter come to your office in the Treasury office again?

A. Yes, sir.

Q. Was that the morning of July 27, 1946?

A. Yes, sir.

Q. And at that time did Mr. Kratter make a telephone call in your presence?

A. Yes, sir.

Q. What number did he call in your presence?

A. Canal 6-8640.

Q. Did you hear the conversation, at least Kratter's part of the conversation, with the party on the other side of the line?

Q. At that time did you give Mr. Kratter any further instructions?

A. I did.

Q. Now let us move on to Friday, July 26, 1946. Did Mr. Kratter come to your office that morning again?

A. Yes, sir.

Q. Did he make a telephone call in your presence?

A. Yes, sir.

Q. Was that telephone call to Canal 6-8640?

A. Yes, sir.

Q. Did you hear the conversation that morning?

A. Yes, sir.

Q. Did you give Mr. Kratter certain instructions that morning?

A. Yes, sir.

Q. Now let us move on to July 29, 1946, Monday. Now tell us in your own words what you did, what you saw and what you heard from Mr. Michelson, if anything?

A. On July 29, 1946, about 10 A. M. together with Special Agents Sherry, Geary, Narcotic Agents Teats and Betts and Revenue Agent Maurice Kratter, I proceeded to the St. George Hotel in Brooklyn and proceeded to rooms 31 and 36, which rooms I had previously engaged. In room 31 there was installed a listening device by the narcotic

agents and a receiving set for this listening device in room 36. At about 11.50 A. M. Revenue Agent Kratter, in my presence, made a telephone call to Canal 6-8640 and [fol. 67] had a conversation. At about shortly thereafter, with Special Agent Geary, I searched the room, room 31, where Revenue Agent Kratter was to meet the defendant Michelson, and then searched the person of Revenue Agent Kratter. He had about $61.59 on his person. I then left Revenue Agent Kratter alone in room 31 and returned to room 36, where I kept room 31 under observation. At about 11.55 A. M. there was a telephone call received in room 31. I heard Kratter hold a conversation. Approximately two or three minutes later I observed a man I now know to be Solomon Michelson, the defendant, approach the door to room 31. I heard a knock on the door. The door was opened. I heard the defendant Michelson say "This is a complicated room to find." I heard Kratter say, "What?" The defendant Michelson replied, "This is a complicated room to find." I then heard Agent Kratter ask the defendant Michelson, "Is everything there?" And I heard the defendant Michelson reply, "Yes. It is in the bag." There was then quite a bit of general conversation and I heard the defendant say to Kratter that he wanted to pay $900 on his 1942 income tax return and $1200 on his 1943 return. There was other general conversation, some of which I observed special Agent Sherry recording, and I then heard Kratter say, "Well, I guess that is about all then," and I approached the door of Room 31, together with Special Agent Geary. The defendant Michelson came out of Room 31——

Q. Excuse me a moment. Have you finished all the conversation you heard in Room 31?

The Court: Which he heard while he was in Room 36.

Q. While you were in Room 36, the conversation you heard in Room 31.

A. There was some other conversation and at one point I heard Revenue Agent Kratter say to the defendant Michel- [fol. 68] son, in effect, "You know the only reason I am doing this is because you insisted upon it; isn't that right?" And I heard the defendant Michelson reply, "Yes, that is right." As Agent Geary and I approached Room 31 the defendant Michelson came out of the room followed by

Revenue Agent Kratter. I observed under Revenue Agent Kratter's left arm a package and I could see currency protruding. I approached the defendant Michelson and informed him I was a Federal officer and showed him my credentials. I asked what he was doing there and he did not reply. I directed him to go back to Room 31, and he went back and sat in a chair close to the window. I then asked the defendant Michelson if he had given Kratter any money and he said, "Yes." I said, "Where is it?" And the defendant Michelson said "He has it" (indicating Revenue Agent Kratter). I then asked Agent Kratter in the presence of defendant Michelson, "How much money was there?" And Kratter replied, "$5,000." I then turned to the defendant Michelson and said, "Is that right?" And he said, "Yes." I said to the defendant Michelson, "What did you give him the $5,000 for?" And he said, "I will tell that to the proper party." I said, "As a Special Agent of the Intelligence Unit I am considered a representative of the Commissioner of Internal Revenue and you can therefore tell me why you gave him $5,000." He refused to answer except saying he would tell it to the proper party, and I said, "I will let you tell that to the United States Attorney." I then brought the defendant Michelson to the Federal Building in Brooklyn, where he was fingerprinted and photographed, and then took him to the office of Assistant United States Attorney Pittoni. Mr. Pittoni informed the defendant Michelson that he need not answer any questions that might tend to incriminate him or degrade him, that he could refuse to answer any such questions, that anything he might say could be used against him or [fol. 69] also for him. I then informed Assistant United States Attorney Pittoni of the circumstances surrounding the arrest of the defendant Michelson, following which Assistant United States Attorney Pittoni asked the defendant Michelson if he had anything to say. The defendant Michelson said, "Anything I could say would only hurt me." Together with Agent Geary, we then counted the money in the presence of the defendant and determined it to be $5,000 in cash. I turned to the defendant Michelson and said, "Is this the same $5,000 which you gave Revenue Agent Kratter?" And he said, "Yes." Mr. Pittoni again warned him against answering any questions that might incriminate him, and then I said to the defendant

Michelson, "Where did you get this money?" And he said, "I took it from my safe."

Q. I show you this——

The Court: May I ask a question?

(Addressing witness). When you went from the door of 36 to the door of 31, how much ground did you cover, about?

The Witness: That is two rooms away.

The Court: And Michelson was emerging from the door?

The Witness: Yes, sir.

The Court: Mr. Kratter was at the door?

The Witness: Yes, sir.

The Court: Was there anyone else in the room at all?

The Witness: No, sir.

The Court: When you left 36 you could still hear the conversation going on; is that right?

The Witness: Yes, sir.

Q. Did you keep Room 31 under observation all the time that Mr. Michelson was in there?

A. I did, sir.

[fol. 70] Q. You saw him go in?

A. I did.

Q. You saw nobody else go in?

A. No, sir.

Q. And the only persons who came out were Kratter and Michelson?

A. Yes, sir.

Q. At what time in the morning did Mr. Michelson go into Room 31?

A. At about 11.55.

Q. About what time did Mr. Michelson come out?

A. At about 12.10 P. M.

The Court: 12.10?

The Witness: Yes, sir.

Q. I show you a brown package, all sealed and initialed. Will you tell us what that package is?

A. This is the $5,000 in cash which I took from the defendant Michelson in Room 31 of the St. George Hotel.

Q. Is that the money which you showed to Mr. Michelson from time to time on July 29, 1946?

A. Yes, sir.

Q. After you showed that money to Mr. Michelson in my room what did you do with the money?

A. Do you want this opened?

Q. Open it up, please.

A. After Mr. Michelson identified this money in Mr. Pittoni's office, it was sealed in his presence. It was then kept in a safe deposit vault in New York until the time of the previous trial, after which it was again resealed by Court Clerk Scott in my presence.

Q. Where was that package kept in the meantime from the previous trial?

A. In the safe deposit vault of the Irving Trust Company of New York.

Q. Is today the first time you are opening it since the last trial?

A. Yes, sir.

Q. Take that money out.

Mr. Pittoni: I offer the $5,000 in evidence, your Honor.

[fol. 71] (There being no objection the $5,000 received in evidence and marked Government's Exhibit 5.)

Q. In what denominations is this money?

A. Fives, tens and twenties.

Mr. Pittoni: Your witness.

Cross-examination.

By Mr. Castellano:

Q. The first time you met Kratter in connection with this case was on July 19, 1946?

A. Yes, sir.

Q. That was a Friday?

A. Yes, sir.

Q. And from that time on you took charge of the entire matter?

A. Yes, sir.

Q. Including all its details?

A. Well, as much detail as could properly be taken care of.

Q. For instance, there was a telephone conversation by Kratter to Michelson alleged to have taken place on July 26th.

A. On July 26th?

Q. Yes, from your office.

A. Yes, sir.

Q. And you were present at the time Kratter called Michelson?

A. Yes, sir.

Q. Did you on that occasion tell Kratter what to say?

A. No, sir. Would you like to know what I told him?

Q. No. I just asked you that question. At the hotel on July 29th you supervised the layout of the two rooms?

A. What do you mean by "supervise"?

Q. Did you give instructions as to where certain instruments were to be placed?

A. In general, yes, sir.

Q. And where chairs were to be placed?

A. In Room 31 I think we moved one chair.

Q. And that is the chair that you wanted Kratter to have Michelson sit in?

A. No. One chair was already in the room close to the window and there was a small table alongside of it, and the other chair was across the room. So we moved the [fol. 72] one chair so that the two chairs would be close together and the conversation would be equal.

Q. Did you tell Kratter in which chair he should sit?

A. No, I don't believe so.

Q. Did you tell Kratter what he should say?

A. Only in general.

Q. Did he follow out your instructions on that occasion?

A. In general, yes, sir.

Mr. Castellano: That is all.

Mr. Pittoni: Now, if it please your Honor, I have another witness, Mr. Geary, Intelligence Unit, and he would testify in corroboration of Mr. Yung.

The Court: Mr. Pittoni says that if called Mr. Geary would corroborate Mr. Yung.

Mr. Pittoni: Do you want me to put him on?

Mr. Castellano: There is no necessity of calling him.

The Court: Have you anything to suggest about it?

Mr. Castellano: He does not have to call the witness. It may be stipulated the record may show he would testify in corroboration of Agent Yung.

Mr. Pittoni: To the same facts?

The Court: That Mr. Geary's testimony would substantially corroborate that of Mr. Yung.

Mr. Castellano: That is right.

The Court: Thank you, Mr. Castellano.

Mr. Pittoni: That being the case, I rest at this time.

The Court: I will excuse the jury for ten minutes.

(The jury withdrew from the court room.)

[fol. 73] The Court: Mr. Castellano, I have excused the jury because I expect you are going to go into questions of law. Is that all right with you?

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Mr. Castellano: Yes, sir. The defendant moves for a directed judgment of acquittal upon the ground that the Government has failed to establish the charge in the indictment beyond a reasonable doubt; upon the further ground the Government has failed to establish intent as charged in this indictment, on both counts. The indictment reads that $5,000 was paid to an officer and a person acting for and on behalf of the United States in an official function under the authority of the Treasury Department, to wit, Maurice M. Kratter, Internal Revenue Agent, with intent to influence his decision and action on a question and matter then pending before him in his official capacity, with intent to influence said Internal Revenue Agent to collude in and allow a fraud on the United States and to induce him to do an act in violation of his lawful duty in respect to the defendant's income tax returns. That seems to be a third intent. Your Honor has already ruled this is not a tax case and there is no evidence whatever in this case showing that the defendant owes the Government any money for income taxes. So there could be no intent to defraud the Government as alleged in the second intent in this indictment. You have a variance between the proof and the pleading.

The Court: The fact that on the face of the return the defendant owed nothing would not necessarily indicate that in fact he owed nothing. There is evidence in the record to the effect that Michelson suggested to Kratter that he show $1200 due for 1943 and $900 due for 1942. It is not my function to say that is believable or not, nor is it my function to draw inferences from it, but I would suspect it is ground for an inference that Michelson was trying

to influence Kratter in the performance of his duty. It might be ground for an inference that he was trying to [fol. 74] defraud the Government, particularly in the light of his conduct with Kratter at the time of his meeting with him in the park, if Kratter is to be believed. I have now no opinion as to whether, having pleaded its intent in the conjunctive, the Government is bound to prove each and every item, but on the supposition that they only have to prove one of those intents and without analyzing it in great detail, I believe there is evidence from which the jury could infer that at least one of those intents was demonstrated, namely, the intent to influence Kratter, an agent of the Government, in his official capacity. I think I would be depriving the jury of its function to grant your motion on that argument. You have an exception to all of this and you do not agree to anything I say, I — not specifically correcting any error I may be making.

Mr. Castellano: On one issue your Honor has referred to, in reference to the amount he paid, Kratter already testified as far as he knew Michelson did not owe a nickel.

Mr. Pittoni: No.

Mr. Castellano: Your Honor struck out that testimony later.

The Court: I now reverse myself and I allow that testimony to remain.

Mr. Castellano: The damage has already been done before this jury.

The Court: I am going to tell the jury that on the question of the believability of Kratter's story that he was approached by Michelson that they are not to try the issue of whether or not Michelson owes money, but they may take into consideration that on the face of the return, according to Kratter, there is nothing shown to be due.

Mr. Castellano: But aside from the face of the return Kratter made the flat statement he had no knowledge of any amount due from the defendant to the Government.

The Court: Not quite that. He said he thought it had not been determined yet, or something like that. Here is [fol. 75] my problem: I am not going to permit Kratter or anybody else in a case of this character to say that Michelson owes $3450.92. I suspect the time for that has not arrived. Moreover, if it had arrived, while it might be admissible, I would rather not let it in.

Mr. Castellano: But your Honor already let in testimony of Kratter over my objection that he did owe $25,000 and there was $35,000 unexplained deposits in the defendant's stock trading account.

The Court: Not on any theory that was the fact, but on the theory that was what was said in the conversation.

Mr. Castellano: Later when the same witness testified he had no knowledge of the defendant owing the Government anything whatever, your Honor struck that out.

The Court: I now reverse myself and reinstate that testimony, but it still would not change the result so far as I am concerned. I am going to say to the jury again they are not trying Michelson for defaults in the payment of taxes. On the question of whether or not he attempted to bribe Kratter, they may take into consideration, if they believe it, Kratter's story about these unexplained deposits, and they may also take into consideration Kratter's statement that on the face of the return Michelson owed nothing; in so far as he knew, he owed nothing. As I said before at one stage of the case, let us be a little realistic about this thing. After all, Kratter is a Revenue Agent and, so far as I know, he has not been in the job of reconstructing this man's income. He is not in a position to say with authority that he has knowledge of defaults on the part of Michelson or deficiencies. Has he?

Mr. Castellano: Except he was allowed to create an atmosphere in the statement of unexplained deposits and his opinion that there was money due to the Government to the amount of $25,000.

The Court: Only because he said that was said to Michelson. If it was said that the moon was made of green cheese [fol. 76] it would not make it so, but it would make it competent as part of a conversation, and so I consider the evidence to be. Now, you have not finished your motion. I interrupted you.

Mr. Castellano: I think I have finished the motion. First, for a judgment of acquittal on the ground the Government has failed to establish a case beyond a reasonable doubt and, second, a judgment of acquittal on the ground of variance in that the Government has failed to prove the case as charged, with the three intents as charged in this indictment, as to each count.

The Court: I overrule you on both grounds, with an exception to you.

Mr. Pittoni: Your Honor, may I respectfully hand up to the Court a memorandum of law which sustains your Honor's ruling with respect to these three intents.

The Court: I have not made any ruling. I merely expressed off the record the opinion that when triple intent is pleaded, if the statement is in the disjunctive, proof of one would satisfy the requirement of sending the case to the jury and the others could be treated as surplusage if no proof was found.

Mr. Pittoni: May I respectfully hand up a memorandum which sustains that opinion, your Honor?

The Court: Yes.

(The jury returned to the jury box.)

The Court: Before you proceed, one minute.

Members of the jury, I do not want to be boresome or wearisome about this, but I want to call your attention to a couple of things. A motion to dismiss and for a verdict of acquittal has just been made and I have denied it for legal reasons. In the course of the trial as I have — to you before from time to time I have sustained or overruled objections. Those are questions of law that have nothing to do with you at all. And the fact that I have denied those motions doesn't mean that I have any opinion either way, [fol. 77] nor does the fact that I overruled or sustained an objection mean I have an opinion either way.

While I am on that subject I want to call your attention to the fact that on cross-examination the witness Kratter was asked a question substantially whether he had any knowledge, he himself had any knowledge of whether on the face of the return there was anything due to the Government from the defendant Michelson. You will remember the testimony; your recollection will govern if it differs from what I tell you. Now, Mr. Pittoni, in the light of something that took place later moved to strike out that answer, and I granted that motion. On reconsideration I have decided to let the answer stand.

What I want to say to you is what I have tried to say to you from the beginning. Do you give me your assurance you won't be influenced in the decision of this case by any of my rulings, do you give me that assurance? And that you haven't been influenced by any of my rulings?

The reason that I let that answer stand is this: We are not trying out the question of whether Mr. Michelson owes

any money to the Government or not, as I have said repeatedly that is not before you. But we are trying out the issue framed by the indictment here, whether he gave a bribe and whether he offered a bribe. But of course in considering the question of whether he gave or offered a bribe you may take into consideration everything that was said between him and Mr. Kratter, and you may also take into consideration for such weight as you may care to give it the fact that the witness Kratter has no personal knowledge of whether Michelson owes anything or not, and on the basis of the returns as filed by Michelson nothing was shown to be due. Is that clear?

Now we will proceed.

[fol. 78] SOLOMON MICHELSON, the defendant, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Castellano:

Q. Mr. Michelson, how old are you?
A. Fifty-six.
Q. Where were you born?
A. Austria.
Q. How long have you been living in the United States?
A. About thirty-six and a half years.
Q. What?
A. About thirty-six and a half years.
Q. Are you a citizen of the United States?
A. Yes.
Q. And have been for how long?
A. Over twenty years, around twenty years.
Q. What was your first occupation when you arrived in this country?
A. I was peddling with candy.
Q. Peddling?
A. Yes.
Q. Candy?
A. Yes.
Q. And how old were you at that time?
A. Oh, I was a young man at that time.

Q. Twenty-one?
A. Well——
Q. Did you go to school in this country?
A. No.
Q. Did you go to school in Europe?
A. A little bit, not much.
Q. Can you read English?
A. A trifle.
Q. Do you write?
A. Just a little.
Q. How long did you peddle candy?
A. About, maybe over a year.
Q. After that what did you do?
A. I went into novelty peddling, novelty jewelry peddling.
Q. For how long?
A. Quite some—about three years.
Q. Where do you reside?
A. 3152 Brighton 6th Street, Brighton Beach.
Q. How long have you resided there?
A. About five or six years.
[fol. 79] Q. Have you always resided in New York City and Philadelphia?
A. In Brooklyn and in Philadelphia.
Q. How long did you reside in Philadelphia?
A. About four years.
Q. And the rest of the time have you always resided in New York City?
A. In New York City, I mean in Brooklyn.
Q. In Brooklyn?
A. Yes.
Q. When did you start business at 74 Bowery, New York City?
A. 74 Bowery, I must have started about twenty or twenty-one, something like that.
Q. Were you at another place in the Bowery before you were at No. 74?
A. Before 74 I was in, I had a store for myself on Canal Street.
Q. What did you sell at that time?
A. Jewelry and watches.
Q. What business did you conduct at 74 Bowery?
A. Watches, diamonds and jewelry.
Q. You buy and sell?
A. Yes.

Q. Were you convicted of a misdemeanor charge in 1927?
A. Yes.
Q. In the Court of Special Sessions?
A. Yes.
Q. New York City?
A. Yes.
Q. And in that case did you pay a fine?
A. Paid a fine of $100.
Q. Will you tell us what the charge was?
A. I bought some diamond watch dials to be placed on different watches, and they claimed, whoever made that charge, claimed these are not genuine dials. To my knowledge I didn't know what those dials are, whether genuine or not, because I bought them in a place——

Mr. Pittoni: I object to anything further.
The Court: Let me hear the answer.

(Answer repeated.)

[fol. 80] The Court: Well, I suppose you want to prove, you are anticipating something, aren't you? I will overrule the objection. Go ahead, and tell us about the dials.

Q. Tell us what a dial is.
A. A dial is the——

The Court: A watch face?
The Witness: A watch face. The old, when the watch gets old they take off the old dial, throw it away and put a new dial on. I went into a certain place and I bought these two dials, and somebody came in and said, "These dials are not genuine," the dials which I purchased. And they gave me at that time a summons, and they gave several people summonses for the same kind of dials——
The Court: What happened?
The Witness: They took us to Special Sessions, and then the District Attorney over there said if I pay a fine——
Mr. Pittoni: I object to what the District Attorney said.
The Court: Yes, I do not think Mr. Castellano wants that. What happened, did you plead guilty?
The Witness: He told me that if I pleaded guilty I will pay $100 fine, and I didn't want to go any further——
The Court: So you pleaded guilty and paid the $100 fine?
The Witness: I pleaded guilty and paid the $100 fine.

The Court: All right, do not anticipate or try to, Mr. Castellano.

Q. Have you had any other trouble since you have been in the United States?

A. No, sir.

[fol. 81] Q. At any other time?

A. No, sir.

Q. Have you ever paid any money to any public official or any person for any unlawful purpose?

A. I never did.

Q. When did you meet Agent Kratter?

A. I met him—Mr. Kratter came into my place of business July 15th, it was on a Monday.

Q. 1946?

A. 1946.

Q. When he same into your place of business did he say anything to you?

A. He took out one of his cards and he gave it to me, and he asked me may I come in.

Q. I show you this card and ask you if that is the card he gave you on that occasion?

A. Yes, that was the card.

Mr. Castellano: I offer it in evidence.

Mr. Pittoni: No objection.

The Clerk: This has been marked previously as Defendant's Exhibit A.

Mr. Castellano: That is right, it is in evidence already as Defendant's Exhibit A.

Q. When he presented you with this card did he have a conversation with you?

A. He asked me if he could step into my place of business.

Q. Will you describe your place of business?

A. My place is a window and a small showcase about 4 feet, and then a big showcase about 7 feet.

Q. And that is part of the space in a large store?

A. It is part of the space on the left hand side of the store.

Q. Are there a great many other showcases there?

A. There is about twenty-four people in the place.

Q. Twenty-four individuals who are in business there?

A. Yes, some jewelers, some have the same business as I have.

Q. And what did Mr. Kratter ask you after he came in?

A. He asked me if he could come in, and I said, "Why not?" And he started in. He asked me if I had my 1942 return.

[fol. 82] Q. What did you tell him?

A. I told him that the returns are with my accountant, Mr. Osterfeld.

Q. Did he ask for anything else?

A. And he said to me, "Can I call up your accountant?" I said, "Why not?" And I gave him the telephone number, and I took the phone from the next counter which the man allowed me to use, and I gave it to him and he called up Mr. Osterfeld.

Q. Did he ask you for any books of record?

A. He asked Mr. Osterfeld if he could look at my books, and he asked him also for the 1942 return.

Q. Did Mr. Osterfeld have the 1942 return?

A. Mr. Osterfeld had the 1942 return.

Q. Did he ask you for any books or records after he got through with the telephone call?

A. After he got through with the telephone call he took off his jacket, and I hung it up for him on the side, and he took a little sheet. I have a chair and a little table there, and he took a sheet out. Then he said "Can I have the books?" I had those books on the bench, and I was making an attempt to give the books to him when he said, "Never mind."

Q. Did he ask for the ledger?

A. Then he says, "Let us see the ledger." And then I took the ledger and tried to give it to him, and then he said, "Put it right here," and right there I have a small little safe, and he said, "Put it on the safe."

Q. After you handed him the ledger what did he say to you?

A. He took a sheet, and then he bent down—he had a briefcase on the right-hand side, and he took out a yellow sheet of paper and he placed it on the table, and while it was lying there, I don't know what he was doing but he was writing on that sheet of paper. What he was putting on that sheet I didn't know, nothing at all.

Q. How long did he write on the sheet?

A. Maybe ten minutes, maybe a little longer, maybe a little less, I don't know exactly what time.

[fol. 83] Q. After that what did you observe?

A. Then he got up and said, "I want $800." I said to him, "For what ?" He says, he bent down and he took out a white envelope, and he held it in his hand and he said, "What I have here in this envelope I could call down the special agents of the F.B.I. and have you locked up immediately." And I was frightened.

Q. What did you do?

A. I went down to my small little safe and I took out $800. There were forty twenties, and I took a piece of paper and I wrapped it around the money and I handed it to Mr. Kratter. Mr. Kratter took the package and placed it on the right-hand side of the table.

Q. What time of day was this, Mr. Michelson?

A. That must have been about, close to, maybe ten minutes of one.

Q. He took the package of money?

A. He took the package of money, the $800.

Q. What did he do with it?

A. He placed it on the side, on the right-hand side on the table there, on the small table.

Q. What did he say about the F.B.I?

A. He told me he has a right to call down the special agents of the F.B.I. and have me arrested.

Q. At the same time was he holding an envelope in his hand?

A. He had a white envelope in his hand.

Mr. Pittoni: I object to Mr. Castellano's method of questioning the witness; he is putting words into the witness' mouth.

The Court: Mr. Castellano is not trying to lead him. He wants the whole conversation repeated, so you repeat it.

Mr. Castellano: That is right.

Q. Tell us what he was holding in his hand.

A. He bent down and put his hand in his briefcase and [fol. 84] he took out a white envelope and he held it in his hand, and he said, "What I have here in this envelope is enough," he says, to call down the special agents of the F.B.I. and have you arrested immediately."

The Court: He said the F.B.I.?

The Witness: The special agents of the F.B.I. he said.

The Court: Of the F.B.I., he said that?

The Witness: Yes.

The Court: You remember that?

The Witness: I remember that positively.

The Court: All right.

Q. Then you handed him a package with $800 in it?

A. I gave him the package, and he reached for the package, he took it and placed it on the right-hand side of that small table.

Q. Up to that time had he examined any of your books or records?

A. He did not make any attempt to. I had tried to give him the book: he had asked for the ledger and I had tried to give it to him and it was laying there on top of the safe.

Q. Did he open any books?

A. He did not open any books.

Q. Did he have any brokerage statement in front of him?

A. That happened later when he came back.

The Court: This all happened on July 15th?

The Witness: On July 15th, Monday.

The Court: In the forenoon?

The Witness: It was, when he got there, it was close to 12 o'clock.

The Court: And he left at what time then?

The Witness: For dinner or when he left at all?

The Court: You couldn't be mistaken on that date?

[fol. 85] The Witness: Not at all, because I just came back from a vacation. We had two weeks' vacation, all the jewelers in the entire block.

Q. Did all the jewelers in your block take a vacation for two weeks?

A. This last year they took a vacation for two weeks.

Q. That is in 1946?

A. 1946.

Q. When did you return from your vacation?

A. I returned from my vacation Sunday night, and I came into the place of business Monday around 11 o'clock.

Q. Were all the dealers in your store closed down during that period?

A. All those dealers in the whole block closed down for that two weeks' vacation.

Q. Where did you go on your vacation?

A. I went to South Fallsburg. It is really Walwich, but the man calls it South Fallsburg in order to elaborate the name of the hotel. The town is really Walwich.

The Court: In New York State?

The Witness: In New York State.

Q. How long were you there?

A. I was there for about two weeks.

Q. Can you give us the name of the place where you stayed?

A. Grand Central Hotel.

The Court: I do not think the place that he stayed on his vacation is so important, but the question of the date is.

Mr. Castellano: It fixes the date.

The Court: Yes.

Q. Then you came back Sunday night, July 14th?

A. That is right.

Q. On Monday morning, July 15th——

A. I came into my place of business.

[fol. 86] Q. At lunch time did Mr. Kratter go to lunch?

A. Mr. Kratter got up and he said, "I am going for lunch."

Q. About what time was this?

A. It was close to 1 o'clock.

Q. And did you go out to lunch?

A. I said to Mr. Kratter, "I am going out for lunch too."

Q. Did you both leave 74 Bowery?

A. We both left, Mr. Kratter was in his shirt sleeves.

Q. What did you do with the $800?

A. Before I left the place I just looked around, when I was outside of the showcase I looked on that small table and the money was not there.

The Court: It was not there?

The Witness: It was not on the small table, so I don't know if he pushed it down into the bag or it fell down on the floor, I don't know what he did with it.

The Court: You didn't see him take it?

The Witness: I didn't see what happened to this money.

The Court: You didn't see him place it in his pocket?

The Witness: I didn't see him put it in his brief-case, no.

The Court: So as far as you know you walked away from there leaving the $800 there?

The Witness: As far as I know when I walked out the $800 wasn't on the table.

Q. Where did you go for lunch?

A. We went across the street in a cafeteria.

Q. Did you both have lunch?

A. We both ate lunch together.

Q. Was the place crowded?

A. The place was crowded, it was full of people.

[fol. 87] Q. And you sat at a table?

A. We sat at a table there, yes.

Q. Were there other people at the table?

A. Yes, other people at the same table.

Q. And you sat there——

A. We sat opposite to one another.

Q. Were all the tables occupied?

A. All of the places were occupied, it is a busy place during that time, during the lunch hour.

Q. While you were in there having lunch did you see Mr. Osterfeld, your accountant, come in the place?

A. Mr. Osterfeld just stepped over to our table while we were sitting there, and then he walked away.

Q. When you came out did you pay your own check?

A. When we walked out I paid two checks, one for myself and one for Mr. Kratter; I paid 85 cents together.

Q. When you reached the sidewalk leaving the restaurant what happened?

A. I wanted to go back to my place of business, and Mr. Kratter said, "No, you go this way, walk this way toward the park."

Q. Towards Christie Street?

A. Towards Christie Street and Hester.

Q. How far away is that from the restaurant?

A. About a block and a half.

Q. Did you walk with him?

A. I walked with him together, yes.

Q. And he asked you to walk in that direction, is that right?

A. He told me to walk that way. I wanted to go back to my place of business, and he said, no, you walk this way.

Q. And you went along with him?

A. I went along with him.

Q. Did you reach Christie Street while you were walking there?

A. Yes, we ran into Christie Street and stepped into the park.

[fol. 88] Q. Did Mr. Kratter sit on a bench in the park?

A. He took a seat on the bench.

Q. Did you sit alongside of him?

A. Yes.

Mr. Pittoni: May I respectfully object again. I would rather have the witness testify.

The Court: Try not to lead him. Tell us everything that happened in the park.

The Witness: When we came to the park, Mr. Kratter sat down and then I sat down. And a few seconds later he said that he changed his mind. He said, "Now, you know now I want $1,000." I repeated and says, "For what?" And he started to threaten me with the agents of the F. B. I., and I was frightened.

The Court: What did you do after that?

The Witness: After that while he was sitting there he was telling me the story of his life, and he told me about his wife and kid, he has a wife and child, and he told me he couldn't get along, and all that stuff.

Q. What else did he say?

A. In about a few seconds later he said, "Oh, no, I will not take $1,000, I want $5,000."

Q. Did you say anything else at that time?

A. Well, I said, "What for?"

Q. And did he say anything else?

A. Well, he threatened me again with the F. B. I., with the special agents of the F. B. I.

The Court: Was he always talking about the F. B. I.?

The Witness: He always kept on threatening me.

The Court: About the F. B. I.?

The Witness: F. B. I. special agents. Even up to now I do not know what the F. B. I. special agents could do to me.

[fol. 89] The Court: But he was always talking about the F. B. I.?

The Witness: The F. B. I.

Q. Did he tell you he would have you arrested?

A. He told me he could have me arrested, he has the authority.

Q. He told you he would call the F. B. I.?

A. Yes.

The Court: Don't lead him. Tell us everything that happened.

Q. What did you say to him when he demanded $5,000?

A. I asked him for what, and he told me he has to adjust my tax statements. While we were sitting there about an hour, after that I got up and I started walking back to my place of business, and he followed me.

Q. Did you say you would give him the $5,000 in the park?

A. I told Mr. Kratter that I only have in my safe now $3,000.

Q. When did you say that?

A. That is when I came back from the park to my place of business. And he told me, "You had better get the $5,000 or else."

Q. What did you say?

A. I was frightened; I was trying to be as calm as I could be, and I couldn't.

Q. What did you say?

A. I said I haven't got the money.

Q. Did you walk back to your store?

A. I walked back to my place of business, and then I opened the door and Mr. Kratter stepped in.

Q. You mean the little gate?

A. In front of my showcase there is a little gate with a little lock inside, a little latch.

Q. And then when you returned to your place of business Mr. Kratter was with you?

A. Yes, sir, he was there.

Q. And he came in with you?

A. Mr. Kratter stepped in, and I went in after him. And [fol. 90] then Mr. Kratter sat down on the chair there, and he told me that he wanted to see the 1942 and 1943, the statements of my broker, which I bent down and I looked up the statement and gave it to him.

The Court: Then what happened?

The Witness: Then he looked over the statement and

he said to me, "Well, I think that I have, I will have to do a lot of work for you," he said. And then he was sitting there figuring, figuring again. I don't know what he was figuring, but he was there figuring on a sheet. He kept on writing on that sheet. What he was doing I do not know.

The Court: What happened next?

Q. How long was he there before he got finished that day?

A. He must have been there up to 3 o'clock.

Q. What time did you come back from the park?

A. From the park, that must have been, with the lunch and the park, I must have been, it must be about 2.30, up to that time about.

Q. How long were you out altogether from your place of business, considering the time that you were at lunch and the time you were in the park?

A. It must have been over an hour and a half.

Q. After you came back how long did Mr. Kratter remain in your place?

A. Mr. Kratter must have been there about thirty minutes, in my place after that.

Q. Before he left did he give you this card, Government's Exhibit 1?

A. Yes.

Q. Will you look at it?

A. Yes.

Q. Did you see him write on that card?

A. He took out this here card, and he just picked up a pad there and he placed the card on it, and he was writing on it that way. Why, he was doing that I do not know. He was writing down a telephone number. He wrote down Gramercy 3-4372, and he gave me that card.

[fol. 91] Q. Did he tell you what number that was?

A. He told me, "This is my home telephone number. When you have the money ready, just call me up and let me know."

Q. Did he tell you when to call?

A. He told me to call him about Friday, the 19th, July 19th before 6 o'clock, five minutes before six.

Q. Did you call him at that number?

A. I called him at that phone number. I called him before, July 19th at five minutes before 6 o'clock, and somebody answered that phone and said that Mr. Kratter was

just walking out, and he said to hold the phone and I will see if we can reach him. And somebody must have gone for him, and they came back and said after a few seconds, "I am sorry, I cannot find him any more. Do you want to leave a message?" I said, "No."

Q. Did you call Mr. Kratter any other time?

A. I did not.

Q. Only on July 19th?

A. July 19th, on Friday.

Q. Did you receive a call from Kratter?

A. I received from Kratter several calls the next week.

Q. Do you recall when you received the first one?

A. The first one must have been about the 22nd.

Q. That would be on a Monday?

A. On a Monday.

Q. Where were you, at your place of business?

A. I was at my place of business.

Q. Did you recognize his voice?

A. Yes.

Q. What did he say to you?

A. He told me if I have the money ready.

Q. What did you say?

A. I said I haven't got the money together yet. He said, "You had better get the money together or else," and he kept threatening me even on the telephone.

Q. After July 22nd did Mr. Kratter come to your place of business?

A. He came in one time for about a few minutes, but I don't remember what day it was.

[fol. 92] Q. But you do know it was after that telephone call of July 22nd?

A. Of July 22nd.

Q. During that week?

A. During that week.

Q. He came to your place of business?

A. He came to my place of business.

Q. How long did he remain in your place of business?

A. About a few minutes only.

Q. Did he talk to you?

A. Yes.

Q. What did he say to you?

A. He told me he is arranging for uptown in a hotel, that I should bring the $5,000 over there, and I objected to that.

Q. What else did he say when he visited you at the store?

A. He told me that you had better bring that money down, or else you know what I could do.

The Court: What do you mean you objected to the hotel?

The Witness: He told me I should bring the whole $5,000 to his hotel there uptown.

The Court: Did you say you wouldn't bring it there?

The Witness: I told him I am afraid to go there with $5,000 in my possession.

The Court: In other words, did you refuse to bring the $5,000, or did you tell him you didn't like the idea of a hotel?

The Witness: I told him I do not like the idea of a hotel.

Q. Then did you get a telephone call from Kratter after his visit?

A. I did.

Q. Give us the time.

A. It must have been around the 26th.

Q. Tell us what he told you on the 26th.

A. On the 26th he asked me again if I have the money, and I told him I just got the money together.

[fol. 93] Q. What did he tell you?

A. He told me he will call me up, he would call me up Monday and he will let me know where I could come down to see him.

Q. And this was on the 26th that you are referring to?

A. On the 26th.

Q. Did you receive any telephone call after the 26th of July?

A. I received a telephone call on July 29th at the time when I was arrested.

Q. What did he tell you on the telephone at that time?

A. He asked me if I have the money, and I said yes. He said, "You come down to Hotel St. George, Room 31." I told him, "How do I get there?" He said, "You take a cab, you will get there to the hotel."

Q. Did he tell you at that time in what form he wanted this money?

A. He told me I should have the money, the first time when he was talking about money, about the $5,000 sum, he told me he wants to have this money in fives, tens and

twenties. In other words, otherwise he said he can't take that money.

Q. Did you go to the Hotel St. George on July 29, 1946?

A. I took a cab and went there, and when I came there——

Q. Did you have with you this bundle of money?

A. Yes, I had the $5,000 with me.

Q. Did you telephone up when you got there?

A. I telephoned up and he told me to come up to Room 31, and I knocked on the door and then Mr. Kratter said come in.

Q. After you went into the door what did you do?

A. When I came in Mr. Kratter said sit down, and he asked me if I have the money, and I said yes. He said, "Let us have it." And I took the money and placed it on the table; there was a small table there, I guess.

Q. How long were you in the room with Kratter?

A. I must have been in the room about ten or fifteen minutes.

Q. What did you talk about in there, do you remember?

A. About many different things; I even spoke about my room, that I can't get no accommodations. I told him different things.

[fol. 94] Q. Do you remember being asked by Mr. Kratter a question, "How much do you want to pay the Government?"

A. He asked me how much do you want to pay, but I don't remember how much I told him.

Q. But you did deliver the $5,000 that he asked you to get?

A. Yes, I did.

Q. What happened, if you recall, to the $800 that you say you gave to Kratter on July 15th?

A. When he got up he sat down and he gave me back the money.

Q. What time of day was that?

A. That must have been before he left.

Q. That was on Monday?

A. Monday.

Q. July 15th?

A. July 15th.

Q. Where did he pick the money from?

A. Well, he had a brief-case on the right-hand side where he was sitting; if he took it out from the brief-case or

from the floor I do not know, but he picked it up and he gave it to me.

Q. Did Mr. Kratter say anything to you at the hotel about adjusting your tax?

A. Mr. Kratter said, "What do you want me to do?" And I told him, I said, "You know what you have to do." And then something else——

The Court: What did you mean by that, "You know what you have to do"?

The Witness: Well, he was threatening me that I owe money to the Government which I really didn't have no idea, even today I haven't got an idea that I owe any money.

The Court: What did you mean when you said, "You know what you have to do"?

The Witness: He asked me the question what do you want me to do. I said, "I don't know, you know what to do." I said, "You got the whole thing from me." I don't know what he wants to do.

[fol. 95] Q. Did you offer Kratter $100 on the sidewalk after you left the restaurant?

A. I never offered him any money, except I offered him $800, which he asked for, and I gave it to him.

Q. Did you ever offer $250 or $300 to Mr. Kratter?

A. Not at all, I didn't offer him one cent at that time.

Q. Did you ever offer him $1,000?

A. He asked for it, but I didn't give it to him at that time.

Q. Did you offer him any money at all in the park conversations?

A. I didn't offer anything at all, only he was asking for money. Mr. Kratter asked me for $1,000.

Q. Did he ever refer to the sum of $100, $250 or $300?

A. He never referred to any of that denominations.

Q. Did Mr. Kratter ask you to explain any deposits at any time on July 15th?

A. He looked at my broker sheets, and he saw some small little checks which I deposited onto the broker sheets; and he asked me what they are, and I told him that maybe, just like sometimes I exchange a check with somebody else and I put it in as a deposit.

Q. On July 15th when Mr. Kratter left your place of business did you go out in the street with him?

A. I did not.

Q. Did you walk with him, in other words, at all that day?
A. I did not walk anywhere.
Q. Did you remain in your store on July 15th?
A. Yes, I did.
Q. When he had completed his examination?
A. He did not make any examination on that day.
Q. When he got through on July 15th?
A. When he got through he left his business card and he said to me, "Goodbye", and he gave me that number and said I should call him up and tell him.
Q. What time do you say it was that he left?

The Court: Three o'clock, he said.
The Witness: Three or after three.

[fol. 96] Q. Did you leave the place with him?
A. I did not.
Q. Before Mr. Kratter left did you make any attempt to hold him in any manner inside the gate in your store?
A. No, I couldn't hold him, the entrance to where Mr. Kratter was going into my place is about 5 feet 5.

The Court: I don't think Kratter said that he attempted to hold him. I think he said he stood in his way.

Q. Did you stand in his way when he was about to leave?
A. I did not, I did not stand in his way.
Q. Did you hold Kratter at any time on July 15th while you were walking with him or over in the park?
A. No, I did not.

The Court: I do not think Kratter said he did.
Mr. Castellano: Kratter tried to create that impression.
The Court: We will let the jury remember what he said to him.

Q. When you were in the park with Kratter did Kratter tell you that he would not or could not return to the store without you?
A. He did not say anything.
Q. Did Mr. Kratter ever give you his home telephone number on a card on the street?
A. Not at all. He gave me the card Monday, about close to 3 o'clock, in my place of business, behind my showcase. He had a little table and that is the time he wrote out the card this way (indicating).

Q. That is the only time he gave you his telephone number?

A. That is the only time he gave me his telephone from his home.

Mr. Castellano: That is all.

[fol. 97] The Court: We may as well take a recess now. Members of the jury, we will take a recess, please, until 2 o'clock. You won't discuss the case amongst yourselves nor try to form an opinion until it has been given to you for decision.

(Recess taken until 2 o'clock P. M.)

Afternoon Session

Solomon Michelson resumed the stand, testified further as follows:

Cross-examination.

By Mr. Pittoni:

Q. Mr. Michelson, this morning, in answer to your attorney's question, you said you came back the night of Sunday, July 18th?

A. I did not say so.

The Court: July 14th.

Q. When did you come back?

A. July 14th, at night.

Mr. Pittoni: Excuse me. It is a matter of dates.

Q. You came back on Sunday night?

A. Yes.

Q. When you were away on vacation where did you stay?

A. At the Grand Central Hotel. That is called——

Q. Never mind. The Grand Central Hotel. Where is the Grand Central Hotel located?

A. It is located in Woodridge but the man calls it South Fallsburg.

Q. Is that the name of the hotel?

A. Grand Central, I think it is. Glick.

Q. Do you remember testifying at the last trial?

A. Yes.

[fol. 98] Q. Do you remember being asked these questions by your attorney, Mr. Castellano:

"Q. Are you sure this was July 15th?

"A. July 15th, Monday.

"Q. How do you fix that date?

"A. I came back from out of town in the morning and when I stopped in at the place it was after 11 and when I had my coat off"—I believe your attorney interrupted you. Now, which is correct?

A. Sunday night I came back from the country, and when I said in the morning I meant I came from the country. The only day that I was back from the country, that is what I meant.

Q. Do you remember saying, "I came back from out of town in the morning"?

A. I don't remember if I said that, but I meant that I came back from the country Sunday night and in the morning I came into my place of business, Monday morning.

Q. Do you remember being asked this question by your attorney:

"Q. From out of town? Where had you been?

"A. South Fallsburg or Walwich."

Mr. Pittoni: This is on page 109 of the previous testimony, your Honor.

Q. (Continuing:) "A. South Fallsburg or Walwich."

A. The man made a mistake——

Q. "This hotel used the name South Fallsburg to make it more impressive, or whatever it is." Now, which is correct.

A. Correct is Grand Central Hotel and Woodridge—the hotel is located near Woodridge.

Q. Just answer the question.

A. Yes.

Q. When did you leave New York to go on your vacation?

A. About two weeks ago.

The Court: You mean two weeks before——

The Witness: Two weeks before.

[fol. 99] Q. What date?

A. I can't remember the exact date, but all of us left at that time. The exchanges all closed.

The Court: Can you suggest the date approximately?
The Witness: About fourteen days before.
The Court: That would be July 1st.

Q. Was that on a Sunday, Sunday or Saturday or what?
A. Maybe it was Friday night or something like that.
Q. Don't you know?
A. I just can't recollect just the exact.
Q. Was your place of business open on Saturdays?
A. On Saturday? No.
Q. Are you married, Mr. Michelson?
A. Single.
Q. You are single?
A. Yes, sir.
Q. What is your home address?
A. 3152 Brighton 6th Street.
Q. When you were up on your vacation, Mr. Michelson, did you bring a lot of baggage with you?
A. I had one satchel. That is all.
Q. That is all?
A. Yes.
Q. When you came back from your vacation did you go back to your home or your store?
A. I went back to my home.
Q. So when you testified at the previous trial, then, Mr. Michelson, that you came back that Monday morning and went direct to your store, that was incorrect; is that correct?
A. I meant to state that I came back Sunday night and Monday morning was the first time——
Q. Did you at any time during that trial ever say you came back on Sunday night?
A. I did not. Maybe I did not explain it right.
Q. Now, how long does it take you to get back from South Fallsburg to Brooklyn or to New York?
A. It might take about five hours.
[fol. 100] Q. Five hours?
A. Five or six hours.
Q. How did you come back from South Fallsburg?
A. With a hacket.
Q. What is a hacket?
A. Those machines, those automobiles, they take you home.

The Court: A taxicab.

Q. What time did you leave Sunday night and what time did you get back to New York or Brooklyn?

A. It must have been after 8 o'clock.

Q. You got back when?

A. About 1.

Q. While you were away on vacation did you have $3,000 in your safe?

A. (No answer.)

Q. While you were away on vacation did you have $3,000 in your safe?

A. I had the money in the safe, yes.

Q. You kept it in the safe all the time while you were away?

A. Yes.

Q. Now, Mr. Michelson, in 1930 you made an application to the City of New York for the purpose of getting a second-hand jewelry license, a vendor's license; is that correct?

A. When?

Q. In 1930.

A. I have a license much before.

Q. Did you make an application for a renewal of your license in 1930?

A. I make it every year.

Q. Every year. Would you recognize your signature if you saw it?

A. Yes, sure.

Q. Will you look at that photostatic copy of that (showing photostat to witness).

Mr. Castellano: I do not see how this is material to this inquiry here.

The Court: Well, we will have to see.

A. Where is the signature?

[fol. 101] Mr. Pittoni: May I step in and show it to him, your Honor?

The Court: Show it to him.

Q. Is that your signature (indicating)?

A. Yes.

Q. That is your signature?

A. Yes, sir.

Q. Now, on this application here there is a question, "If applicant has ever been arrested or summoned for any

offense, such facts must be stated in full, giving number of times and final disposition." Then underlined here it says, "If none, state so," and you have got the word "No" there; is that correct?

Mr. Castellano: I object to that and move to strike it out.

The Court: Why?

Mr. Castellano: The question is improper on the issues presented here.

The Court: Oh, no.

Q. You put that word "No" there?

A. I didn't put anything, because there is a certain agent who gives the bond.

Q. You put nothing on there, then?

A. He comes in and makes out all the questions and everything and tells me to sign. Every year he does that.

The Court: Was the answer on when you signed it?

The Witness: I didn't see that.

Q. When you made this application for a license in 1930 you did not put on there, did you Mr. Michelson, that on March 24, 1927, you were convicted of counterfeiting trademarks on watches and that you were sentenced to pay either $100 or 30 days in jail? You did not put that down, did you?

[fol. 102] Mr. Castellano: Your Honor, that is not the charge in that case. Possession of counterfeit.

The Court: Sustained on that ground.

(Addressing witness) You did not say in that paper that you had been arrested and that you were convicted of that dial charge?

The Witness: I have a letter from the Commissioner of Licenses which he questioned that here and I answered it and I think Mr. Castellano must have my letter there, and the Commissioner O. K'd—he said it is nothing; it is O. K.

Q. Where do you usually keep your books and records in your place of business?

A. At my place of business I keep it right open.

Q. Your books and records are always right open?

A. Yes, it is on a slide in the window.

Q. Let us see, in answer to your attorney's question this morning you told us certain facts as to what happened on

the morning that Mr. Kratter came in for the first time. What day do you say that was?

A. July 15th.

Q. That is the first time that you ever saw Mr. Kratter in your life?

A. The first time I saw him.

Q. And that is the day that you say he came in around 12 o'clock?

A. Close to 12 o'clock.

Q. Then around 1 o'clock you and he went to lunch?

A. Yes.

Q. Then around some time after 2 you came back from lunch and walking through the park, is that right?

A. Yes.

Q. And that is the day when you say he left you somewhere after 3 o'clock, is that right?

A. Yes.

Q. What did Mr. Kratter do when he came in, reconstruct that picture in your own words, Mr. Michelson?

A. When he came in he took a seat on the chair next the [fol. 103] table, and then he told me, "Let us see your books, statements from 1942 and 1943."

Q. Yes. Go ahead.

A. And he looked at them.

Q. Yes.

A. And then he had a piece of paper, and he was writing on that piece of paper, I don't know what, and then he said, "You have some little checks there," and he said if I could explain, and I said no.

Q. Go ahead, what happened after that?

The Court: Did you show him the broker's statements when he first came in?

The Witness: After dinner I showed that to him.

The Court: Mr. Pittoni was asking you what happened when he first came in.

Q. I want you to reconstruct the picture between 12 and 1. Go ahead.

A. I didn't get you.

Q. Even though it is repetition, you go ahead.

A. He came in close to 12 o'clock. He showed me his card, one of his cards, and he asked me if he may come in, and

I said why not. And I opened that door for him, and he stepped in.

Then he asked me for the 1942, my return for 1942 and I told him I haven't got it with me. He said, "Where is it?" I said, "My accountant has it."

Then I gave him the telephone from my next neighbor, next door neighbor. I picked up the telephone, the receiver, and I said, "You could use this phone and call up Mr. Osterfeld, he works for LaPrensa." And he calls up Mr. Osterfeld, and asked him for the 1942 return. And he asked him if he could look at my books.

Then he turned around to me, he hung up and he said it is O. K., he told me that I could see your books.

Q. Yes.

A. He took a seat. Then I made an attempt, I went over to give him the books, and he said, "Never mind." He said, "Show me your ledger." I picked up the ledger and took [fol. 104] it over to him. There is a small safe next to my table, and he said, "Place it on that safe." I placed the ledger on the safe. He was taking out, he took out a yellow sheet of paper and he placed it on the table and he started writing. What he was writing I do not know at all.

All of a sudden he got up, he says, "I want $800." And I says, "For what?" And he says, "You better come across with $800, otherwise I could call the F. B. I. in on you." And I was really frightened.

The Court: He said the F. B. I.?

The Witness: The special agents of the F. B. I., he said. And I was really frightened. I bent down to my safe, and I took out $800, 40 20s, and I took a small piece of paper and put it around. You could see the money on both sides. And I handed it to Mr. Kratter, which Mr. Kratter took and placed on the table on the right-hand side.

Then he was sitting there for a few minutes, and then he got up and said, "I am going for lunch." I says, "I go for lunch, too." So we both went out for lunch. I first turned around and looked over my showcase on the table, and I didn't see the money. I don't know if he put it in the briefcase or he throwed it on to the floor, I don't know, but I didn't see the money on the table. And we walked over across the street in the restaurant.

Q. All right, let us stop at this point. Did he ask you for the books in the morning before you went to lunch?

A. He did.

Q. Did he ask you for the books the moment that he walked in?

A. The moment he walked in, he came in and he says, he wants to see my 1942 statement, I mean the income tax return. That is what he asked me.

[fol. 105] Q. You say that he asked to telephone your accountant also that same morning?

A. I gave him the telephone.

Q. He asked you to give him the accountant's telephone number, is that right?

A. I gave him the telephone number to call up.

Q. Did he say he wanted to speak to your accountant?

A. Yes.

Q. Subsequently did he talk to your accountant?

A. He did talk to my accountant.

Q. You say after he talked to your accountant, and after he asked your accountant for the books, and after he told your accountant who he was there in your place of business, you say then after that he demanded the $800. is that right?

A. I can't get you.

Q. Let me start all over again. You say he telephoned your accountant, is that right?

A. Yes.

Q. You say he asked your accountant for permission to look at your books?

A. Yes.

Q. Then after he finished talking to your accountant for a few minutes, after that he turned to you and he said, "Give me $800?"

A. I beg your pardon, you are just trying to get me wrong.

The Court: No, no. Answer the questions now.

The Witness: No, it is not so.

Q. How long after he spoke to your accountant did he demand $800?

A. He demanded $800, it must be about 15 minutes later.

Q. At any rate it was after he spoke to your accountant, is that correct?

A. That is correct.

Q. Now, do you remember your testimony at the last trial?

A. I do.

Q. Page 98, do you remember being asked this question:

"Q. What did he say then?

A. When he got in, it was July, a hot day, he took off his [fol. 106] jacket. I hung it on the side. There are racks, I hung up his jacket. I have a small table with a chair, and Mr. Kratter sat down and he said, 'Let me see your books'."

Is that correct?

A. I did not mean it that way.

Q. You now say he asked you to look at your broker's statement?

A. I didn't say that either.

Q. (Continuing:) You are speaking now, "The books were laying on a bench there. I wanted to give him the books and he said, 'Never mind.' He said, 'Let me see your ledger.' He said, 'Place the ledger on the safe.'"

Is that correct?

A. That is correct.

Q. Continuing without a break: "He was taking out a yellow sheet of paper, whatever he was writing I do not know, and all of a sudden he got up and he says to me, 'I want $800.'" I says, 'For what?' He says, 'I have so much on you I will put you away in jail right away.'"

A. That is correct, but he took out an envelope and showed it to me like this (indicating). He didn't let me look at it.

Q. Up until this time you hadn't heard him telephone your accountant at all, had you?

A. Up to this time, he called up before.

Q. You testified again at the previous trial, page 115:

"Q. About what time did you go to lunch?

A. It must have been close to one.

"Q. Before or after one?

A. Before one.

"Q. So you say he came to your business close to 12 o'clock, and close to 1 o'clock you and he went out to lunch?

A. Yes."

So far is that correct?

A. He went out, and then I went after him——

Q. Wait a minute. So far is that correct?

A. Yes.

Q. "Q. And meantime he introduced himself to you as an Internal Revenue Agent?

A. He gave me his card.

"Q. Then he started to look at your books?

A. He did not look at the books.

[fol. 107] "Q. He did not look at the books?" This is still on the same page.

"A. No, he only asked for the books. I made an attempt to give them to him. He said, 'Never mind.'"

Is that correct?

A. That is correct. He just say, "Let use see my books," and then he says, "Never mind."

Q. "Q. And that is when you say, between twelve and one, he said, 'I want $800'?

A. He sat down and said, 'Let us see the ledger.'

"Q. Yes, go ahead.

A. I handed him the ledger, and I had a small safe next to the table. He placed it there, and he did not look at the ledger.

"Q. He did not look at the ledger?

A. No.

"Q. He said, 'Give me $800'?

A. He didn't say that, he said, 'I want $800'."

Q. I am reading from your previous minutes.

A. That is O.K., anybody could make a mistake——

The Court: Please don't make any comments.

The Witness: I do not, but——

The Court: Well, don't.

Q. "Q. Now you say you gave him $800? What did he do with the $800?

A. He took the money and placed it on the side toward the wall on the little table.

"Q. How long after that did you go to lunch?

A. About ten minutes later."

A. That is correct.

Q. During all those minutes, all that testimony that you have given at the previous trial, did you at any time mention having talked to your accountant over the telephone, or Mr. Kratter talking to your accountant over the telephone?

A. He did just when he came in——

The Court: No. At the last trial did you mention that?

The Witness: I must have mentioned that.

The Court: So far have you heard any mention of it in your testimony that Mr. Pittoni read?

[fol. 108] The Witness: Yes.

The Court: Have you?

The Witness: I must have mentioned that, because that is the way it was.

Q. Let us see. You say this man Kratter, this young fellow Kratter, whom you never saw in your life before, came into your place of business, and within a short while after he was there he shook you down for $800, is that what you say?

A. I gave him $800. He said, "I want $800."

Q. Yet at 1 o'clock when he said he was going to lunch you said you would go with him?

A. I said I will go for lunch too, I didn't say "with him."

Q. But when you walked into the restaurant he sat down at a table, is that correct?

A. We went both over to the counter——

Q. He sat down to a table, is that right?

A. Yes.

Q. And you followed him and sat down with him, correct?

A. We both sat at the same table.

Q. After you finished your lunch you offered to pay the lunch of the man whom you say shook you down for $800, is that correct?

A. I paid his lunch; I didn't say I offered to pay it, I paid it.

Q. You grabbed the check?

A. I picked up both checks, not one check.

Q. That is the man whom you say shook you down for $800?

A. Demanded $800.

The Court: But Mr. Pittoni means then you bought him lunch.

The Witness: Whenever people come into our place of business we always——

The Court: No. I mean on that day.

The Witness: On that day, if it would be a different gentleman I would also pay his lunch; if he goes for lunch and I go for lunch I pay his lunch.

[fol. 109] The Court: Whether he asks you for a bribe or not?

The Witness: This man had me entirely dazed, I didn't know what I was doing.

Q. This store that you have got at 74 Bowery, you are the tenant in that store, are you not?

A. What?

Q. You are the tenant?

A. I am also the tenant, and I also own the contract.

Q. You sublet?

A. It is not I, the corporation sublets.

Q. You are the president?

A. I am not the president, I am only an officer.

Q. You own stock in the corporation?

A. There are two partnerships in this business which we took the lease for.

Q. Is that you and Aronoff?

A. You and Aronoff?

Q. I mean you and Aronoff.

A. Michelson and Aronoff.

Q. Even though it was summer, in July on a hot summer day, there were a lot of people in that store?

A. Not quite a lot of people, not a lot of people; there is always people in there.

Q. There were at least five or other people there besides yourself?

A. You can't get in 500 people there.

Q. Five people, I said.

A. Where, in that store?

Q. Yes.

A. There is always more than thirty or forty or fifty people, not five people.

Q. So you say with all those people around Mr. Kratter came in there and demanded $800 from you?

A. When he was in my place of business, on my side.

Q. How wide is that store?

A. 25 feet.

Q. How long is it?

A. 75.

Q. Now, you say that towards the end of the meeting with Mr. Kratter he asked you for $5,000?

A. That wasn't towards the end, that was in the park.

Q. In the park?

A. Yes.

[fol. 110] Q. You say Mr. Kratter asked you for $5,000?

A. First he demanded $1,000. He said, "I don't want $800, I want $1,000."

Q. Do you remember the occasion in the St. George in Room 31?

A. I remember some of it.

Q. When you gave that $5,000 to Mr. Kratter in the Hotel St. George, do you remember some of the conversation?

A. If you will refreshen me I will remember it.

Q. Do you remember being asked this question at the previous trial by Mr. Castellano:

"Q. What else was said?

A. Mr. Kratter asked me, 'What do you want me to do for that?' I said, 'You know what to do.'"

Did Mr. Kratter say to you in the Hotel St. George?

A. I don't remember it.

Q. Would it be correct if you testified to that at the previous trial?

A. It is possible, but I don't remember it now.

Q. That is page 107 of the minutes. Now, let us go back to the restaurant. You say you went with Mr. Kratter to the restaurant a little after 1 o'clock, is that right?

A. I didn't say after, I said before 1 o'clock, to the restaurant I went before 1 o'clock.

Q. Before 1 o'clock?

A. Close to 1 o'clock I said.

Q. So to just keep our times straight, Mr. Kratter came in that place of business for the first time in your life about 12 o'clock?

A. Close to 12 o'clock I said.

Q. And you said a little before 1 o'clock he went with you, he and you went to the restauraat?

A. He went out and I went after him.

Q. So in the meantime only a span of less than an hour has passed by?

A. I don't know how much of a span it was, but that is the way it happened.

Q. So you sat down in the restaurant with Mr. Kratter, and while you were sitting there with Mr. Kratter, you [fol. 181] saw your accountant in the restaurant?

A. My accountant just walked past by me.

Q. You saw him?

A. Yes.

Q. Later on did your accountant come near your table?

A. In my place of business?

Q. No, we are still in the restaurant now.

A. My accountant was only once near my table.

Q. He came near your table?

A. That is the first time.

Q. How long was the accountant in the restaurant?

A. I didn't see him before.

Q. How long was your accountant in the restaurant?

A. I didn't see him before.

Q. How long had he been, as far as you remember, in the restaurant?

A. I don't remember; only a flash when he passed me by.

Q. Did you see him at all after that in the restaurant?

A. I did not see him at all.

The Court: Did you see your accountant at any time between what you say was the 15th of July and the 29th of July?

The Witness: I did see him, sure.

The Court: When did you see him next after the 15th?

The Witness: I must have seen him the same day.

The Court: On the 15th?

The Witness: Either the 15th or the 16th.

The Court: After Kratter left you?

The Witness: After Kratter left me, because my accountant told me he was waiting for me in my place of business over an hour.

The Court: Did you talk to your accountant about Kratter?

The Witness: Yes, I told my accountant about him and I told him I am really surprised.

The Court: You told him what?

[fol. 112] The Witness: I am really surprised what is happening now. I don't understand it, I told him.

The Court: Did you tell him you were solicited for a bribe?

The Witness: Yes.

The Court: On that day?

The Witness: I told him that the agent came in and he immediately made an attempt for money.

The Court: Did you say how much?

The Witness: I told him that he demanded the last thing $5,000.

The Court: What did he say to you?

The Witness: He didn't tell me anything.

Q. You say you told your accountant on that day?

A. That day or the previous day. Just exactly I can't tell. I am a sick man and you are trying to put me down. Well, if I wouldn't be sick I wouldn't give up a nickel to this man; I would pull him in immediately.

The Court: Do you want to take a recess? All right, we will take a recess.

(A short recess was taken.)

Q. Do you remember at the last trial being asked this question by the Presiding Judge, Judge Inch:

"Q. And at lunch you saw your accountant?

A. Yes." Is that correct?

A. Yes.

Q. "The Court: Who had prepared your income tax?

A. Yes, sir."

Mr. Castellano: May it please your Honor, I do not see how this is relevant. It is an improper examination of the witness.

The Court: I don't know so far. Go ahead, Mr. Pittoni.

[fol. 113] Mr. Pittoni: About one-third of the way up, your Honor.

The Court: Yes.

Q. "The Court: Did you tell the accountant that this man you were having lunch with had demanded $800 from you?

The Witness: No."

Do you remember testifying like that the last time?

A. Yes.

Q. "The Court: You did not tell him?

The Witness: I did not have a chance to talk to the accountant in the restaurant. I could not talk with him."

A. That is correct. I couldn't talk in the restaurant with him.

Q. Do you remember what the Judge's question was, though?

A. I don't remember.

Q. "Did you tell the accountant this man you were having lunch with had demanded $800 from you?

A. No."

Now between the day that Mr. Kratter was in your place of business the first time, the day you say is the 15th, and the day of your arrest, July 29, 1946, did you tell anybody else besides your accountant that Mr. Kratter tried to shake you down?

A. I spoke to my accountant. That is all.

Q. You told nobody else?

A. I had no occasion to talk to somebody else.

The Court: Well, did you?

The Witness: I did not.

Q. What did your accountant say to you when you say you told him Kratter wanted $800 from you?

A. He spoke about $5,000.

Q. You told your accountant that?

A. Yes, about the $5,000 at that time.

Q. That Mr. Kratter wanted $5,000 from you?

A. That was the last demand.

[fol. 114] Q. What?

A. The last demand, he demanded $5,000.

Q. You told that to your accountant?

A. Yes.

Q. What did your accountant say to that?

A. He answered me something, but I don't remember what he told me.

Q. Did your accountant tell you to report that to the authorities, that a Government agent had tried to shake you down for $5,000?

A. Did he tell me?

Q. Yes.

A. I don't remember that either. I don't think he told me.

Q. If you told your accountant that Mr. Kratter wanted $5,000 from you, you say your accountant did not say anything to that?

A. I only told him that Mr. Kratter demanded $5,000 of me.

Q. Did you tell anybody else between that time and the day of your arrest that Mr. Kratter demanded $5,000 from you?

A. I did not tell at all.

Q. Did you tell anybody at any time that Mr. Kratter at first asked for $800 and you gave him $800?

A. Somebody else?

Q. Anybody else?

A. I didn't tell nobody.

Q. Do you remember the day of your arrest?

A. July 29th.

Q. That is right. Do you remember Mr. Kratter saying to you in Room 31 at the Hotel St. George, in effect: "I am only doing this because you want me to," and your answer being, "Yes?"

A. I don't remember that.

Q. After you came out of Room 31 on July 29, 1946, do you remember being approached by Mr. Yung, Special Agent Burke Yung of the Treasury Department?

A. I remember being approached, but I didn't spoke to nobody.

Q. Do you remember telling Mr. Yung that you would tell the story to the proper authority?

A. I do remember that.

Q. That is the first time you ever said that to anybody; is that correct?

A. I remember I told that to Mr. Yung.

[fol. 115] Q. When Mr. Yung said to you, "I am a Special Agent of the Internal Revenue Bureau, a representative of the Commissioner's office," and he said, in effect, "What are the facts?" you refused to give him the facts; is that correct?

A. I didn't give anything. I didn't say anything.

Q. You did not tell Mr. Yung at that time that this man, Mr. Kratter, who had been in Room 31, had shaken you down for $5,000?

A. I didn't say a word to Mr.——

Q. Yung?

A. Yung.

Q. Do you remember being taken to my office in this building on the same date, July 29th?

A. I do.

Q. You were brought into my room; is that correct?

A. Yes.

Q. And Mr. Kratter came in, too, did he not?

A. Yes.

Q. Do you remember Mr. Kratter being asked to leave?

A. I don't remember that.

Q. Do you remember later on that you and I and Mr. Yung were left alone in the room?

A. I can't recollect that.

Q. Do you remember saying to me you refused to talk in the presence of Mr. Kratter?

A. I don't remember that, either.

Q. Do you remember my warning you of your rights, that you did not have to answer any questions?

A. Correct. You told me I shouldn't talk because whatever I say is going to be used against me.

Q. Do you remember my also saying that if you say anything in your favor that can be used in your favor?

A. I don't remember that.

Q. Do you remember when the agents tried to ask you any questions I warned you not to talk because anything that you said might be used against you?

A. Absolutely.

Q. That you did not have to talk unless you wished to?

A. That is right.

Q. After Mr. Kratter left the room, after I warned you of your rights, and so forth, do you remember Mr. Yung [fol. 116] saying to you, "Now you can tell Mr. Pittoni the story?" Do you remember that?

A. I don't remember that. I was very upset at that time. That was right after my arrest.

Q. Do you remember being asked this question and your saying to me and to Mr. Yung, "Anything I say will only hurt me?"

A. Yes.

Q. Who was going to hurt you?

A. I don't know, but it came out of the——

Q. You didn't tell me on that day that Mr. Kratter was an extortioner, did you, that he was trying to get money out of you, did you?

A. No, I didn't say anything to you.

Q. You never said anything to me at any time by pointing your finger at Mr. Kratter and saying, "That man shook me down for $5,000?"

A. No, I didn't say a word to you.

Q. You never told anybody?

A. No, not a word.

Q. One more question: Is the Grand Central Hotel the only hotel you stayed at during your vacation?

A. That vacation? Yes.

Q. The only hotel?

A. The only hotel.

Q. Is that Woodbridge?

A. You see the place——

Q. Is that Woodbridge?

A. It is Woodbridge, but the man calls it South Fallsburg.

Mr. Pittoni: That is all.

Redirect examination.

By Mr. Castellano:

Q. Mr. Michelson, you were asked a question about a telephone call from Kratter to your accountant on July 15th. I will read to you your testimony at the last trial, page 108, at the bottom of the page:

"Q. Did Mr. Kratter telephone to your accountant, Mr. Osterfield, on that first Monday, July 15, 1946, in your presence?

A. In my presence he asked me, and I gave him the tele- [fol. 117] phone number. I gave him the phone that belongs to the next counter. The gentleman said I could use his phone. I said, 'You do not have to go in the back.'"

Do you recall giving that testimony at your last trial?

A. Yes, I do.

Q. "Q. He called Mr. Osterfeld from your store?

A. He called Mr. Osterfeld up."

Mr. Pittoni: What page?

Mr. Castellano: Page 109.

Q. Do you remember being asked that question and giving that answer?

A. What?

Q. Referring to Mr. Kratter, I asked you a question:

"Q. He called Mr. Osterfeld from your store?

A. He called Mr. Osterfeld up."

Q. Is that correct?

A. Yes, he did.

Q. You stated that you kept $3,000 in the safe at your store at 74 Bowery?

A. Yes, I did.

Q. When was that?

A. That was at the time before July 15th—I mean before I was away on a vacation.

Q. And the money was there while you were on vacation?

A. Yes.

Q. Did you have the Holmes Protective Agency protecting your store?

A. The whole place has Holmes protection.

Q. Holmes protection?

A. Yes, and in the back we have a big safe which is protected by a cabinet, the Holmes protection, and the whole place has straps. That small safe is protected by a strap.

Q. Did you notify the Holmes Protection Agency the place would be closed up the two weeks prior to July 15th?

A. They must have been notified by Aronoff. He generally does that.

The Court: You don't know?

[fol. 118] The Witness: He is my partner.

The Court: Mr. Castellano wants to know whether you notified them.

The Witness: I did not.

Q. Do you know whether your partner notified the agency?

A. He must have.

The Court: Did Aronoff tell you he notified them?

The Witness: Generally every time when we go away from the place a few days——

The Court: Did Aronoff go with you?

The Witness: No. He goes to a different place.

The Court: But Aronoff went on a vacation.

The Witness: Yes. They all went. The whole block went.

Mr. Castellano: That is all.
Mr. Pittoni: That is all.
(Witness excused.)

Isodor Gerstein, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Castellano:

Q. Mr. Gerstein, will you give me your full name?
A. Yes. Isidor.
Q. Last name?
A. Gerstein.
Q. Where do you reside?
A. 74 Bowery.
Q. That is your place of business?
A. That is right.
Q. How long have you been in business there?
A. Twelve years.
[fol. 119] Q. Do you occupy one of the counters in that store?
A. That is right.
Q. Did all the jewelers in that store close their place of business two weeks prior to July 15, 1946?
A. Yes, sir.
Q. And no one entered that store during that period?
A. No, sir.
Q. Did you go on vacation during that period?
A. Yes, sir.
Q. Do you recall the 15th day of July, 1946?
A. Yes.
Q. Do you remember seeing Mr. Michelson at his counter in that store on Monday, the 15th of July?
A. Yes.
Q. Did you see anyone else there?
A. I saw a lot of people and I saw that inspector who came in there.
Q. Did you see Mr. Kratter?
A. Yes.
Q. Do you know Mr. Kratter?
A. Yes.

Q. Where was Mr. Kratter on July 15, 1946?

A. In Mr. Michelson's place, when he came in and took off his coat and hanged it up and sat down by the desk.

Q. A little table behind the counter?

A. Yes.

Q. Was he in his shirt sleeves?

A. That is right.

Mr. Castellano: That is all.

Cross-examination.

By Mr. Pittoni:

Q. Had you ever seen Mr. Kratter before?

A. When before?

Q. Before the 15th?

A. No.

Q. Did you ever see him again?

A. Never.

Q. You did not testify at the last trial did, you?

A. No, sir.

Q. When for the first time did you talk to anybody about this case?

A. About this case?

Q. Yes.

A. When I saw anybody?

[fol. 120] Q. When for the first time did you talk to anybody about Mr. Michelson's case?

A. Here lately. All the way through since that case started last month some time ago.

Q. When for the first time were you told you were going to be a witness on this case?

A. Oh, I spoke to the lawyer and Mr. Michelson about two weeks ago, a week ago or maybe three weeks ago. I know all the way through about that, when I saw in the papers what happened.

Q. When for the first time did Mr. Michelson or Mr. Michelson's attorneys mention the 15th to you, July 15th?

A. I didn't see nobody at that time.

Q. A lot of people come into your place of business, don't they?

A. Yes.

Q. Maybe hundreds of people during the day?

A. Maybe a hundred, maybe less, maybe more. People are coming in and out, in and out.

Q. In and out. Now, you say you saw Mr. Kratter at Mr. Michelson's place on July 15th?

A. Yes.

Q. You never saw him before that?

A. No.

Q. You never saw him after that?

A. No.

Q. Did he speak to you; Mr. Kratter?

A. No.

Q. Did Mr. Michelson say he knew that that was Mr. Kratter?

A. Yes. He told me he was an inspector.

Q. Did he introduce you?

A. No.

Q. Did he tell you what Mr. Kratter was in there for?

A. No.

Q. No? Did he tell you the very same day Mr. Kratter was there who Mr. Kratter was?

A. Maybe the same day, maybe a day later or two days later.

Q. He did not tell you what Mr. Kratter was there for?

A. He didn't tell me his business.

Q. Did he tell you that Mr. Kratter demanded $800 from him?

A. No.

[fol. 121] Q. Did he tell you that Mr. Kratter demanded $5,000 from him?

A. No. The only thing what I saw in the papers when it happened.

Q. You saw in the papers about the arrest. Did Mr. Kratter appear to be polite when you saw him on that day?

A. I beg your pardon?

Q. Was Mr. Kratter polite when you saw him on that day?

A. I saw him come in and behind the showcase and he took off his coat and he hanged it up and then they had a conversation there, I didn't pay attention closely because I didn't know what it is all about.

The Court: Were you watching all the time?

The Witness: Well, I can't miss it because I am right here and they are in front of me.

The Court: How far away from you?

The Witness: About 6 or 7 feet.

The Court: 6 or 7 feet?
The Witness: Like from here to that gate (indicating).
The Court: They were sitting there?
The Witness: Sitting there and talking.
The Court: Were they whispering?
The Witness: Well, they were talking about.
The Court: They were talking.
The Witness: Yes.
The Court: Were they whispering?
The Witness: Something like a little argue.
The Court: A little arguiment?
The Witness: Yes.
The Court: Could you hear it if you listened?
The Witness: A little bit.
The Court: Did you hear anything about "I am going to send the F. B. I. in and arrest you"?
[fol. 122] The Witness: No, I didn't hear that exactly, because it wasn't so loud.

Q. Did you hear Mr. Kratter demand $800?
A. No.
Q. You have no record of that day, the 15th, have you?
A. If I have the record?
Q. July 15th.
A. I had the record because we were——
Q. You have no record of July 15th?

Mr. Castellano: Let him answer that.
The Court: Yes. (Addressing the witness) How do you remember, Mr. Pittoni means. How do you remember this day was the 15th?
The Witness: I remember because I have to be in the business the 15th, Judge.
The Court: You had to be back?
The Witness: That is right, on Monday.
The Court: Could it have been the 16th?
The Witness: The 15th, Monday.
The Court: Or the 17th or 18th?
The Witness: No, sir.
The Court: That Kratter was there?
The Witness: No. Monday.
The Court: It had to be on the 15th?
The Witness: That is right.
The Court: Why did it have to be the 15th?

The Witness: Because it was the first day opened the place.

Q. Now tell me, you say you were on vocation for two weeks. When did you come back from your vacation?

A. I came back Sunday—Saturday. I was away at Sharon Springs, I came back on Saturday.

Q. Are you married?

A. Yes.

[fol. 123] Q. What time Monday did you go to work in the morning of the 15th?

A. I usually get in at 9.30.

Q. What time do you usually go to lunch?

A. Sometimes 2 o'clock, sometimes 1.30, sometimes later when I am busily occupied, I don't bother with lunch until later then.

Q. What time did you go to lunch on the 15th?

A. Maybe late, I couldn't tell you exactly when I go. I go sometimes 2 o'clock, sometimes 3 o'clock, sometimes 2.30.

The Court: But what time did you go on that day, do you know?

The Witness: I couldn't tell you exactly just when I go, Judge, but I went pretty late, very late.

Q. Did you see Mr. Michelson go out to lunch?

A. Yes.

Q. Did you go to lunch before or after Mr. Michelson went to lunch?

A. After, when I left after I couldn't say exactly, but I went after.

Q. Did Mr. Michelson go alone?

A. Go alone where?

Q. For lunch?

A. Somebody went out first, Mr. Michelson, he went out first and then the inspector; they went together, they went together.

Q. Who went out first?

A. Oh, the inspector went out first.

Q. And Michelson went after him?

A. That is right.

Q. Were you there when they came back?

A. I didn't see them when they came back, I didn't see them.

Q. How long were you there during the 15th?
A. In the place?
Q. Yes.
A. Until we closed up.
Q. What time do you close up?
A. Six o'clock.
Q. Did you see Mr. Michelson come back?
A. After that?
[fol. 124] Q. Yes, after lunch.
A. I saw him there all the time in the afternoon.
Q. Did he come back alone?
A. Yes.
Q. He did. And how long was he there after he came back alone?
A. He was there all afternoon.
Q. Did he tell you anything after he came back from lunch?
A. Just he tell me that the inspector was there.
Q. That is all?
A. And that is all.
Q. The inspector didn't come back with him?
A. I couldn't tell you that.
Q. When Mr. Michelson came back from lunch you say you were there, is that right?
A. Yes.
Q. When he came back he took his usual place in the store, is that right?
A. Yes.
Q. And his usual place in the store is about six feet away from you?
A. Yes.
Q. And the rest of the afternoon he was about six feet away from you?
A. Yes.
Q. You were there the rest of the afternoon and so was he?
A. That is right.

Mr. Pittoni: All right, your witness.
The Court: All right.
Mr. Castellano: Did Mr. Michelson tell you that this man was a Revenue Agent?
The Witness: Yes.
Mr. Pittoni: Oh——

The Court: Inspector he said.

Mr. Pittoni: Will you kindly ask proper questions and not leading questions. What did you tell him?

The Court: Wait a minute, wait a minute. Go.

[fol. 125] Redirect examination.

By Mr. Castellano:

Q. Did Mr. Michelson tell you on July 15th about the man who was behind the counter?

A. Yes.

Q. Did he tell you who the man was?

A. Yes.

Q. What did he say?

A. He says the Revenue was there.

The Court: The Revenue?

The Witness: Or whatever you call him.

The Court: Mr. Castellano wants to know what Mr. Michelson said, what he said the man was.

The Witness: The Revenue.

Q. Did Mr. Michelson talk to you again after the first trial?

A. Yes.

Q. That was the second time he talked to you?

A. Yes.

Mr. Castellano: That is all.

(Witness excused.)

Mary E. Kirk, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Castellano:

Q. Your full name, Miss Kirk?

A. Mary E. Kirk.

Q. Where do you reside?

A. 115 East 82nd Street.

Q. Are you employed?

A. I am employed by the firm of Charles Gulden, Inc.

Q. That is the mustard company?
A. The mustard firm.
Q. Is that company the landlord of 74 Bowery?
A. That is correct.
[fol. 126] Q. New York City?
A. Yes.
Q. Do you know the defendant Solomon Michelson?
A. Yes, I know him.
Q. How long have you known him?
A. I would say about 15 years, at least 15 years.
Q. Do you know other people who know him?
A. Yes, I do.
Q. Have you had occasion to discuss his reputation for honesty, truthfulness and as a law-abiding citizen?
A. I wouldn't say I have, but I never heard anything against him; so far as I know his character is excellent.

Mr. Castellano: That is all.

Cross-examination.

By Mr. Pittoni:

Q. Miss Kirk, did you ever hear that Mr. Michelson on March 4, 1927, was convicted of a violation of the trade-mark law in New York City in regard to watches?
A. No, I did not.
Q. And that he was sentenced to pay a fine of $100 or 30 days in jail?
A. No.
Q. Did you ever hear——
A. No.
Q. (Continuing:) —that on October 11, 1920, the defendant, Solomon Michelson, was arrested for receiving stolen goods?
A. No.

Mr. Castellano: I object to that.
The Court: I sustain it.

Defendant's Motion for Mistrial

Mr. Castellano: I move for a mistrial; I do not think it is proper.
Mr. Pittoni: I just gave you a memorandum, I just gave you a memo on that.

The Court: I overrule the objection on the basis of United States v. Comerford, 64 Fed. (2d) 28, and Stewart v. United States, 104 Fed. (2d) 234, and other cases. However, I in-
[fol. 127] struct the jury that what is happening now is this: the defendant has called character witnesses, and the basis for the evidence given by those character witnesses is the reputation of the defendant in the community, and since the defendant tenders the issue of his reputation the prosecution may ask the witness if she has heard of various incidents in his career. I say to you that regardless of her answer you are not to assume that the incidents asked about actually took place. All that is happening is that this witness' standard of opinion of the reputation of the defendant is being tested. Is that clear?

Mr. Castellano: Exception.

(Last question and answer repeated.)

The Court: Any other questions?

Mr. Pittoni: No other questions.

(Witness excused.)

Benjamin Orgel, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Castellano:

Q. What is your occupation, Mr. Orgel?
A. Manufacturing jeweler.
Q. Where are you engaged in business?
A. 83 Canal Street.
Q. How long have you been in business?
A. Over 25 years.
Q. Always in the City of New York?
A. That is right.
Q. Do you know the defendant, Michelson?
A. I do.
Q. How long have you known him?
A. More than 25, 30 years. Between 25 and 30 years.
[fol. 128] Q. Do you know other people who know him?
A. Yes.

Q. Have you had occasion to discuss his reputation for honesty, truthfulness and for being a law-abiding citizen with these other people?

A. No.

Q. You never talked with them about those things?

A. Just that I haven't heard anything derogatory against him.

Q. Have you ever talked——

The Court: He says he has not discussed his reputation.

The Witness: His reputation, that is understood from my viewpoint that he was an honest man always and a law-abiding citizen.

Mr. Pittoni: I object to that.

The Court: I fully sympathize with the witness, I must say, with all due respect to the law of evidence, but the gentleman said he hasn't discussed his reputation, but he has heard nothing against him.

Mr. Castellano: That is all.

Mr. Pittoni: No questions.

(Witness excused.)

DAVID OPPENHEIM, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Castellano:

Q. What is your occupation?

A. Watch-case maker.

Q. Where are you engaged in business?

A. 133 Canal Street.

Q. How long have you been engaged in business?

A. Over 27 years.

[fol. 129] Q. In New York?

A. In New York, yes, sir.

Q. Do you know the defendant Michelson?

A. I know him very well.

Q. Do you know other people who know the defendant Michelson?

A. Yes, I do.

Q. Have you had occasion to discuss with other people his reputation for honesty, truthfulness and being a law-abiding citizen?

A. Yes.

Q. What is his reputation as such?

A. Very, very good, very honest.

Mr. Castellano: That is all.

Cross-examination.

By Mr. Pittoni:

Q. Did you ever hear that on March 4, 1927, the defendant, Solomon Michelson, was convicted in the Court of Special Sessions?

A. Yes, I did, I had been at the trial, too.

The Court: You were at that trial?

The Witness: Yes.

Q. And you know that he was fined $100 or 30 days in jail?

A. That is right, but there were other——

Q. Just a minute. Did you ever hear that on October 11, 1920, the defendant, Solomon Michelson, was arrested in New York City for receiving stolen goods?

A. That I never heard.

Mr. Castellano: I renew the objection on the ground that it is irrelevant.

The Court: Yes, but the cases specifically cover that situation.

Mr. Castellano: I am familiar with those cases relating to convictions.

[fol. 130] The Court: No, Mr. Castellano: I am talking about the cross-examination of a character witness. I am wondering whether you had any special point about it, because the cases seem quite clear.

Mr. Castellano: All right.

The Court: Have you any special point aside from the question of direct proof in order to impeach a person's character that you may not prove an arrest? Are you applying that law to this?

Mr. Castellano: That is right.

The Court: Well then, I overrule your objection on that with an exception to you.

Mr. Castellano: Yes.

The Court: Again I say to the jury there is no proof that Mr. Michelson was arrested for receiving stolen goods in 1920, there isn't any such proof. All this witness has been asked is whether he had heard of that. There is nothing before you on that issue. Now would you base your decision on the case fairly in spite of the fact that that question has been asked? You would? All right.

Step down.

(Witness excused.)

Louis Weitzman, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Castellano:

Q. Mr. Weitzman, what is your occupation?
A. Motion picture business.
Q. Where?
A. Union City, New Jersey.
Q. How long have you been in the business?
A. Since 1917.
Q. In the motion picture business?
A. Yes.
[fol. 131] Q. Do you operate theatres?
A. I have two theatres there.
Q. Do you know the defendant Michelson?
A. Yes.
Q. How long do you know Mr. Michelson?
A. About 30 years.
Q. Do you know other people who know him?
A. Yes.
Q. Have you had occasion to discuss his reputation for honesty and truthfulness and for being a law-abiding citizen?
A. It is very good.
Q. You have talked to others?
A. Yes.

Q. And what is his reputation?
A. Very good.

Mr. Castellano: That is all.

Cross-examination.

By Mr. Pittoni:

Q. Did you ever hear that on March 4, 1927 the defendant, Solomon Michelson, was convicted for a violation of the trade-mark law and was sentenced either to pay a $100 fine or spend 30 days in jail?
A. No, sir.

The Court: You said no?
The Witness: No, sir, your Honor.

Q. Did you ever hear that on October 11, 1920 the defendant, Solomon Michelson, was arrested in New York City for receiving stolen goods?
A. No.

Mr. Pittoni: That is all.
The Court: Do you still repeat your testimony given on direct?
The Witness: I do.
Mr. Pittoni: He still says "No."
The Court: Step down.

(Witness excused.)

[fol. 132] Abraham Osterfeld, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Castellano:

Q. Mr. Osterfeld, do you know the defendant Michelson?
A. I do.
Q. Have you served as his accountant?
A. I have.
Q. Have you served as his accountant?
A. Yes, I have.

Q. Do you recall the 15th day of July 1946?

A. I do.

Q. Do you recall receiving a telephone call from Michelson's place of business?

A. That is right.

Q. Do you know who called you on that occasion?

A. A gentleman who gave me the name as Krapness or Kratter.

Q. What did he say to you?

A. He told me he was in Michelson's business office, he says, whether he could have the books, and he asked for the 1942 return.

Q. What did you tell him?

A. I told him it was perfectly all right to go ahead, and I will have the return the next day.

Q. Did you have the copies of the 1946 return of the defendant Michelson at the time?

A. I have all the copies at my home of all the years past.

Q. Did you have the 1942 return on that day?

A. I did.

Q. And you had it at home?

A. That is right.

Q. Did Kratter ask for that return?

A. He did.

Q. Did you tell him you would get it for him?

A. That is right.

Q. Later on that day did you go to Michelson's place of business?

A. I did.

Q. About what time?

A. It was about 1.15 or 1.20.

Q. Was Michelson in his store at the time?

A. He was not.

[fol. 133] Q. What did you do after that?

A. I walked across the street to a restaurant to get something to eat; that was my usual lunch hour.

Q. Did you have anything to eat there?

A. I just ate some jello.

Q. While you were there did you see the defendant Michelson?

A. I did.

Q. Was he with someone?

A. He was with another gentleman, a young man.

Q. Did you talk with Michelson while you were in the restaurant?

A. I did not.

Q. How long did you remain in the restaurant?

A. About five or ten minutes, as long as it would take me to finish the jello.

Q. Where did you go from the restaurant?

A. I went back across the street to Michelson's place of business.

Q. How long did you wait there?

A. I waited there for forty or forty-five minutes.

Q. Where did you go after that?

A. I went back to work.

Q. Where did you have to go back to work?

A. At 245 Canal Street, for the Spanish newspaper, LaPrensa.

Q. You do accounting work also?

A. I do.

Q. Did Mr. Michelson tell you anything with reference to a demand, did he say anything to you about $5,000?

A. He spoke to me that evening. I went back because I was interested in what happened, and he told me he had some business with this man, and told me something about money, and that he would tell me more later on.

Q. Did he mention a figure of $5,000?

A. He did.

Q. Did he say what the figure was for?

A. No, he did not.

Q. Did you say anything to Michelson?

A. I told him not to give any money as far as I was concerned, as the returns are O.K.

[fol. 134] The Court: Did he say that this man had tried to shake him down?

The Witness: Well, not exactly shake him down. He said that this man was going through his records, and he wanted money from him.

The Court: Did he say that this man demanded a bribe?

The Witness: No, he did not use those terms.

The Court: Did he use any terms from which you thought he was endeavoring to bribe him?

The Witness: No, he implied that there was additional tax due.

The Court: He didn't tell you anything that would indicate to you that it was a bribe?

The Witness: No, sir.

Q. After July 15th did you telephone to Kratter?

A. I did.

Q. Do you recall when?

A. I called on the 16th, and a young lady answered that he was not in. I left my name and address. Then I called him again on the 17th, and the same answer was given to me. And again I called subsequent at Mr. Michelson's request to my office, and a gentleman answered and said that Mr. Kratter was on his vacation.

Q. Did Mr. Michelson come to you to find out——

The Court: I wasn't clear where these calls were made, where he made these calls.

Q. Did you call Kratter at his office?

A. Yes, at his office.

Q. Do you know where his office was?

A. At a Cortlandt number.

Q. Do you know the address?

A. I think it was 225 Broadway.

[fol. 135] The Court: I thought they said 253 Broadway.

Mr. Castellano: That was another office; they have another office there I believe.

The Court: Oh, 165.

Mr. Castellano: 165, that is right.

Q. Did Michelson visit you and request you to make a call?

A. He did, on Thursday morning.

Q. What date was that?

A. That was the 17th.

Q. Did you call again after Michelson visited you?

A. That was the 18th, I believe, the 18th.

Q. Did you at all times have this copy of the return ready?

A. I did, and gave it to Mr. Michelson on that Thursday morning.

Q. What date?

A. The 18th.

Q. Of July?

A. July.

Q. 1946?
A. That is right.

Mr. Castellano: That is all.

Cross-examination.

By Mr. Pittoni:

Q. In the restaurant did you go over and talk to Mr. Michelson, Mr. Osterfeld?
A. I did not.
Q. Did Mr. Michelson come over to you and tell you in the restaurant that Mr. Kratter was trying to shake him down?
A. No, he did not.
Q. Did Mr. Kratter greet you at all in the restaurant?
A. Just by his eyesight.
Q. He didn't go like this (indicating) to you or anything?
A. No, he did not.
Q. Just looked in your direction?
A. That is right.
Q. Did he seem to be in argument with Mr. Kratter, the man with him?
A. At the time I saw him they were getting either dessert or something and going back to eat — the table.
[fol. 136] Q. Everything seemed to be rather calm?
A. Well, I would judge that way.
Q. Did Mr. Michelson act in his usual way from your observation?
A. Well, I sat at a distance there, and it appeared to be he was uneasy.
Q. Now, in your job with LaPrensa you are pretty much your own boss, aren't you?
A. To a certain extent.
Q. You can come and go as you please?
A. No.
Q. On this particular occasion you were out of the office of LaPrensa quite a bit of time, weren't you?
A. I am out every day quite a bit of time.
Q. So that you can come and go as you please, is that correct?
A. Only during my lunch time.

Q. How long were you out for lunch on that day?

A. About two hours.

Q. Then you went back to Mr. Michelson's office that very same day?

A. That is right.

Q. So on that particular day you were out for lunch over two hours, and you were also——

A. I said about, not over.

Q. What?

A. I said about, not over.

Q. How long had you been an accountant for Mr. Michelson?

A. Well, I have been doing his work for him for the past twelve years directly myself. Prior to that time he had a bookkeeper, and I supervised the returns. In all about twenty years.

Q. Does he usually from your observation take you into his confidence on financial matters?

A. No, I wouldn't say that he does.

Mr. Castellano: I object to that question.

The Court: I think the witness can answer a question like that.

Mr. Castellano: If you think so; it is calling for the mental operation of the witness.

The Court: So far as he can judge I think so.

[fol. 137] Q. Will you answer yes or no?

The Court: He has answered. He said, "I do not think he does."

Q. At any rate at no time up until the day of his arrest did he ever tell you that Mr. Kratter tried to shake him down for any money?

A. Prior to his arrest he spoke to me about it in general terms; he told me that the man asked for $5,000.

Q. That isn't what I asked you. Do you remember the Judge asked you before——

A. Yes.

The Court: Mr. Witness, let us make a distinction between a legitimate or even an exorbitant demand for extra taxes and a bribe.

The Witness: All right.

The Court: You can make that distinction?

The Witness: Yes.

The Court: What Mr. Pittoni is endeavoring to ask you is, prior to Michelson's arrest did you even suspect from anything he said that somebody was trying to solicit a bribe from him?

The Witness: No, sir, I could not.

Mr. Pittoni: That is all.

Mr. Castellano: That is all.

(Witness excused.)

NEIL SMITH, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Castellano:

Q. Mr. Smith, where do you reside?

A. 1921 East 32nd Street, Brooklyn.

Q. What is your occupation?

A. Sales manager.

[fol. 138] Q. For whom?

A. Standard Milling Company.

Q. What line of business?

A. Flour; Hecker's Flour.

Q. How long have you been with that company?

A. Five years.

Q. Before that what was your occupation?

A. Assistant sales manager of the Beechnut Packing Company.

Q. For how many years?

A. Nineteen years practically.

Q. Do you know the defendant, Solomon Michelson?

A. Very well.

Q. How long do you know Mr. Michelson?

A. More than twenty years.

Q. How did you come to meet him?

A. In his place of business on the Bowery when I made a purchase from him.

Q. Has he been to your home on occasions?

A. Yes. For the past ten years or more he has been to my home for Thanksgiving and Christmas regularly.

Q. Do you know a lot of people who know Mr. Michelson?

A. Yes, I do.

Q. Have you had occasion to discuss his reputation for honesty, truthfulness and for being a law-abiding citizen?

A. Yes, sir.

Q. What do you find his reputation for those things to be?

A. I would call it excellent.

Mr. Castellano: That is all.

Cross-examination.

By Mr. Pittoni:

Q. Did you ever hear that on March 4, 1927, the defendant, Solomon Michelson, was convicted of violating the New York City trademark laws and was sentenced to pay $100 or thirty days in jail?

A. If that was in reference to watch dials, I did hear about it.

Q. Did you ever hear that on October 11, 1920, the defendant, Solomon Michelson, was arrested for receiving stolen goods?

[fol. 139] Mr. Castellano: The same objection.

The Court: Same ruling.

Mr. Castellano: Exception.

A. No.

The Court: Would it have made any difference if you had known that latter?

The Witness: I don't think so.

Mr. Castellano: The defendant rests.

The Court: Any rebuttal?

Mr. Pittoni: There is a possibility, your Honor, that I may want a minute or two on Wednesday.

The Court: How long will it be?

Mr. Pittoni: Very short.

The Court: Would you like to have some time to make up your mind about it, because if you do I will give Mr. Castellano the same privilege on surrebuttal.

Mr. Pittoni: I would rather try to fully complete the case myself right now, but I want to make sure.

The Court: Your adversary is to have the same privilege.

The Court: Do you want to say something, Mr. McNamara?

Mr. McNamara: I wanted to say something to Mr. Castellano.

Mr. Castellano: We would like a daily report sheet. We have the ones for the 16th and 17th, and we would like to have the one for July 15th.

The Court: To be produced, you mean?

Mr. Castellano: Yes. It was produced at the last trial.

The Court: Do you want to offer it?

Mr. Castellano: Yes, I would like to offer it.

Mr. Pittoni: I will offer it as a Government exhibit if you want.

[fol. 140] Mr. Castellano: All right.

Mr. Pittoni: Do you want to make this part of the other two exhibits?

Mr. Castellano: It doesn't matter.

(Daily report for July 15th received in evidence and made part of Government's Exhibit 2.)

The Court: Since we are not to close the case today, you have the option to withdraw your statement that you rested.

Mr. Pittoni: Your Honor, all I want is initial rebuttal. If he is closing, then it is surrebuttal to mine.

The Court: I know that. I was thinking along different lines. If one side has the opportunity to look over the case and go back, the other side should have the same privilege.

Mr. Castellano: Then let us withdraw the defendant rests right now.

Mr. Pittoni: All right; we will rest right now.

Mr. Castellano: Then both sides rest. All right.

The Court: Members of the jury, I will excuse you until 10.45 on Wednesday, and you will please not discuss the case among yourselves, and try to form no opinion at all, permit no one else to discuss it with you, and keep your minds open until it is submitted to you for decision.

(Whereupon an adjournment was taken to 10.45 A. M., Wednesday, January 8, 1947.)

[fol. 141] Brooklyn, New York, January 8, 1947.

Appearances:

(As Before Noted)

Trial Continued

Ruling on Requests to Charge

(The following occurred in chambers with the jury not present.)

The Court: First as to Mr. Castellano's requests. Request No. 1 I intend to charge.

Request No. 2 I intend to charge in substance. That is, I intend to tell the jury what the charge laid in the indictment is, but at the end of that portion of the charge I intend to read the statute to them, or at least to paraphrase it.

Charge No. 3 I intend to charge in part, namely: I will charge that there can be no conviction unless a criminal intent is established. Mr. Castellano excepts to my refusal to charge in the language requested?

Mr. Castellano: Correct.

3. There can be no conviction unless the criminal intent is established and the criminal intent charge here is in three parts, to influence the decision of the Agent in the matter pending before him, to influence the Agent to collude in and allow a fraud on the United States, and the final intent to induce him to do an act in violation of his duty with reference to the defendant's income tax returns. This is the intent charged in the indictment and the Government must establish such intent beyond a reasonable doubt before you can convict.

The Court: Request No. 4 I intend to charge with modifications. In the sixth line of the request I intend to substitute the word "or" for "and" in both places. In the next to the last line of the request I intend to delete the [fol. 142] words "as charged in the indictment." The theory of my dealing with the request in that way is that the three forms of intent set forth in the statute are in the disjunctive; the indictment pleads those three forms of intent in the conjunctive. It is my own belief that if the jury finds any one form of specific intent, that that is a sufficient basis

for a conviction, given all the necessary ingredients of a conviction.

Mr. Castellano excepts to my refusal to charge request No. 4 in the language charged?

Mr. Castellano: That is right.

4. In determining the criminal intent, if any existed, you must therefore decide (1) was there a matter pending before the agent in his official capacity, (2) did any facts exist from which you can draw the conclusion that the defendant desired to influence the agent to collude in and allow a fraud on the Government, and (3) did any facts exist from which you can draw the inference that the defendant intended that the agent violate his duty in reference to the defendant's income tax returns. If you find that such intent as charged in the indictment did not exist you must return a verdict of not guilty.

The Court: Request No. 5 I intend to charge as modified so that it will read as follows:

"Government officers may not incite, instigate or cause the commission of a crime for the sole purpose of prosecuting and punishing it."

Mr. Castellano: As modified that is satisfactory.

The Court: Request No. 6 I intend to modify by striking out "It is contrary to public policy and to established law to punish" so that the charge as made will read: "A man cannot be convicted for the commission of a crime which he would never have committed if the agents and officers of the law had not inspired, incited, persuaded and lured him to commit."

[fol. 143] Mr. Castellano: The modification is satisfactory.

The Court: Request No. 7 I intend to charge as modified in the following way so that it will read: "Even where a person may appear to have violated the letter of the law, if it appears that such violation originated with and was brought about by the acts of the Government agent, it is the duty of the jury to find such person not guilty."

Mr. Castellano: That is satisfactory.

The Court: Request Nos. 8 and 9 I intend to charge in substance. The only reason why I don't charge them in the language requested is because it is to a certain extent I believe repetitious. In other words, in the colloquial

charge I intend to cover entrapment and to inform the jury as well as I can that the primary test of entrapment is where the idea of the crime originated. Both of the requests embody that language. I intend to charge the jury colloquially that if the crime originated with the agent, that then they cannot convict the defendant.

Mr. Castellano: Exception.

8. The Trial Judge and you members of the trial jury are only advised as to the facts in every case when they are developed at the trial. If the trial shows an issue of fact as to whether the agent originated the idea of the money payment or whether the idea originated with the defendant, it becomes the duty of the Court to submit that question to the jury along with other questions that arise in the case.

9. Even though the evidence shows that the money did pass to the agent from the defendant, it still becomes the duty of the jury to determine who originated the idea for the delivery and payment of this money. The mere delivery or payment of the money is insufficient to convict because if you believe that the idea originated with the agent, it would become your duty to acquit the defendant. Any other ver-
[fol. 144] dict would lead to an absurd and unjust result which would be contrary to the intent of Congress in passing the bribery law.

Mr. Pittoni: Do you mind if I interrupt?

The Court: Certainly not.

Mr. Pittoni: If you are going to charge colloquially in regard to entrapment, what is the necessity for charging the fifth, sixth and seventh except as repetitious? They have all got to do with entrapment here.

The Court: Only this, in my colloquial charge I intend to try to follow as closely as I can the language of 5, 6 and 7.

Mr. Pittoni: I see.

The Court: The same disposition is true of No. 9 which again embodies the idea of who originated the thought of the crime. I do not think it adds anything to the others, I think it is largely repetitious.

Mr. Castellano: That is satisfactory.

The Court: And the same thing is true of No. 10.

Mr. Castellano: Yes.

The Court: Request No. 11 I intend to modify. I am going to say to the jury that in itself the fact that the de-

fendant paid a fine of $100 twenty years ago does not establish his guilt that that evidence is offered merely on the question of credibility.

Mr. Castellano: Satisfactory.

The Court: That here we are dealing only with the bribery charge specifically laid in the indictment.

Request No. 12 I intend to charge in the language requested. I have some doubt about whether entrapment is such an ingredient or element of a crime that the reasonable doubt rule applies to it, but that is merely abstract legal theory. I think that as a matter of practice in criminal cases that if there is reasonable doubt on the issue of entrapment the defendant ought to be acquitted, and I intend to charge that way.

[fol. 145] No. 13 I am going to refuse on several grounds: First, that it is a summary of the evidence, and I do not think it is advisable for a Judge to accept from either side in a criminal case its own summary of the evidence. I think he should summarize the evidence as well as he can. Secondly, I believe on the issue of entrapment it is repetitious, and if the entrapment claim is well covered in the colloquial charge there seems to be no point in reiterating everything that is set forth in No. 13. You can except to that, Mr. Castellano.

Mr. Castellano: Yes, we will take an exception to that.

Mr. Pittoni: You do?

Mr. Castellano: Yes.

13. Defendant contends that the criminal design here originated with the agent upon the agent's first visit to defendant's place of business and that the agent implanted in defendant's mind the idea of paying over $5,000 in cash. You have heard the evidence relating to this first visit by the agent when two cards with the name of the agent and his Revenue office address printed thereon. One card has the agent's home telephone number written in pencil thereon. The agent admitted writing his residence telephone on one card which he wrote at the store of defendant and gave it to defendant. You have the duty to consider this evidence in determining who proposed the idea of paying money for any unlawful purpose. If you find the idea originated in the mind of the agent and was proposed by him you must return a verdict of not guilty on both counts. If

you have a reasonable doubt on this question you must return a verdict of not guilty on both counts. Likewise you must consider the other evidence including the lunch, the walk to the park and the conference in the park. You may properly ask, are these the usual methods of performing the duties of a Government official or was it all part of the official's plan to induce and cause a payment of money upon [fol. 146] which to base a prosecution, if it was a plan of the agent, you must acquit the defendant.

The Court: No. 14 is in the same category as the others I mentioned, and so is 15, and so is 16. In other words, I intend to try to cover entrapment in the colloquial charge on the authority of cases like Abdallah and others, and possibly the Ray case, although that is only a District Court case.

Mr. Castellano: That is satisfactory as to 14, 15 and 16.

Mr. Pittoni: And the Lindenfeld case?

The Court: And Lindenfeld mainly. 17 I intend to charge in the language requested.

18 I intend to charge in the language requested.

19 I intend to charge in the language requested, and also No. 20.

21 I refuse to charge in that language. I intend to charge the jury on their duty to deliberate practically in the language of United States v.—what is that case?

Mr. Castellano: Will you charge as stated on page 178 of the record, there is no proof that Mr. Michelson was arrested for receiving stolen goods in 1920. There isn't any such proof. That is what you stated on page 178 of the record.

The Court: What did I say?

Mr. Castellano: "There is no proof that Mr. Michelson was arrested for receiving stolen goods in 1920, there isn't any such proof." That is what you said after Mr. Pittoni cross-examined the character witness.

The Court: Yes.

Mr. Castellano: That is the statement you made at page 178.

The Court: And I will now add to that, there couldn't be any such proof because the prosecution would be disabled to offer it. However, in the light of the case and the treatment given the subject by Wigmore in Section 988 I now ask Mr. Pittoni, is it a fact according to the best infor-

[fol. 147] mation in your possession, that Michelson was arrested for receiving stolen goods?

Mr. Pittoni: Absolutely.

The Court: I now ask the Reporter to mark for identification a paper which Mr. Pittoni has given me.

Mr. Pittoni: That is to show my good faith.

(Marked Government's Exhibit 6 for Identification.)

The Court: The rule as stated by Wigmore is this, that while that form of examination is permissible, and there are a host of cases both Federal and State on the subject, that it is subject to abuse in that counsel may make matters up out of thin air and ask witnesses the question merely for the purpose of asking the question; that therefore it is a matter which should be controlled.

This is the first time I have dealt with the subject, and in the future I intend to deal with it as I have dealt with it now, namely, to call the examining counsel up to the bench and ask counsel to give me his word as an officer of the court that he isn't making that up, and that he is merely using the question in an endeavor to test the standards of the character witness concerning what the defendant's reputation and character is, and for no other purpose.

I have already instructed the jury on the purpose of the evidence, and I am glad you reminded me of it, I intended to get something in the record to show this.

Mr. Castellano: Would you add to the jury that they are not permitted to assume that any subsequent proceedings were had other than the arrest?

The Court: Of course I meant to say that, and I intend to try, if possible, unless I forget it, to reiterate to the jury that the sole and only purpose of asking the question was to test the standards of the witness testifying.

The case that I had in mind was a case where the jury had come back and reported that they were in hopeless disagreement, and the Judge charged the jury further [fol. 148] and here is what he said. The case is United States vs. Winters, 117 on the October Term, 1946.

"You should give heed and take counsel with your fellow members on the jury. You should not hold out for any caprice, for any arbitrary reason. And while I would not want you for a moment to relinquish or abdicate any firm conviction that you may have, yet the minority ought to give due weight and due consideration to the majority.

Now, you understand I am not saying to you that you should relinquish any firm conviction that you have, but I really think you should retire again."

Approving of that Judge Frank says:

"We see nothing whatever in defendant's assertion that the Judge's remarks on the desirability of reaching a verdict constitute coercion of the jury."

All I can do is to follow my betters.

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Mr. Castellano: The defendant now moves for a directed verdict of acquittal on the whole case and on the grounds stated at the close of the Government's case.

The Court: I think that covers everything under the new rules?

Mr. Castellano: I think so.

The Court: Motion denied, and the defendant excepts.

Mr. Castellano: Exception.

(The following proceedings were had in the presence of the jury:)

The Court: You may proceed, Mr. Castellano, if you are ready.

(Mr. Castellano summed up to the jury.)

[fol. 149] CHARGE OF THE COURT

KENNEDY, U. S. D. J.:

Members of the jury: I would like to tell you at the outset what your function, your job, is, and what mine is. It is my duty, as you have seen, to rule on the admission of evidence and to rule on questions of law that come up during the trial; and that function is mine alone. If you should disagree with my rulings or with the instructions on the law that I give you, that wouldn't be right, because it isn't any part of your job to pass on those matters. And by the same token you have the sole responsibility of deciding the facts in this case, deciding what happened as a matter of fact here—not I, not the counsel.

It is proper that each side through its counsel should put its best foot forward and should argue in good faith the facts as counsel sees those facts. That is highly proper, and this trial has been very competently conducted by counsel on both sides. But nevertheless statements of fact

by counsel are not binding upon you if your recollection differs. And it is the same way, as I will have occasion to say to you more at length in a moment, concerning what witnesses are to be believed and what witnesses are not to be believed. So that all I am attempting to do at this time is to outline to you the rules of law that you should apply in your decision in a case of this character.

The defendant is here by virtue of an indictment, and I say to you that an indictment in itself is not proof of anything at all. It is merely a charge. And this indictment charges in two parts the commission of a crime against the United States by the defendant. In the first part or count it charges that the defendant on July 29, 1946, gave a sum of money, namely, $5,000, to a Government agent with intent to influence his decision and with intent to influence him in allowing a fraud on the United States, and with an intent to doing acts in violation of his lawful duty, that is, to induce the agent to do that.

[fol. 150] Count 2, covering the same transaction, is substantially the same in its import except that instead of charging the defendant with giving the money it charges him with offering the money on the same day.

The statute under which this indictment is laid provides in substance that whoever promises or offers or gives any money or other thing of value to any person acting in behalf of the United States with the intent to influence his decision or with the intent to influence him to aid in a fraud upon the United States, or with an intent to induce him to do any act in violation of his duty, is guilty of an offense.

As a result of the form the proof took in this case, as I see it, the Government is bound to establish beyond a reasonable doubt in this case, and I will mention that in more detail later, three essential ingredients of the crime with which the defendant is charged. The first is that the defendant either gave or offered, or both, money to a Government agent. The second is that when the difendant gave or offered, or both gave and offered, this money to the Government agent it was the defendant's intention either to influence the agent's decision or to influence the agent to allow a fraud on the Unted States, or to influence the agent to violate his duty. Normally those would be the only two elements of the crime as outlined in the statute. However, as I said, by virtue of the form that the proof has taken there is a third element here. The defendant

claims that the idea of the crime did not originate with him, but did originate wth the agent Kratter. And under rules which I will outline to you immediately after I dispose of this particular matter, the Government under those circumstances is bound to prove beyond a reasonable doubt that the crime did originate with the defendant.

So you have the three elements: Did the defendant give or offer money to a Government agent, which is No. 1. No. 2 is, did he do it with intent to influence that agent's decision or to perpetrate a fraud upon the United States, [fol. 151] or to induce that agent to violate his duty. And third, did the intent, the idea of committing the crime, originate with the defendant or with the agent.

The claim that is made in this case by the defendant that the thought of crime originated not with him but with the agent Kratter is a defense which the law calls entrapment. Entrapment of a defendant by Government agents exists only when Government agents originate and induce the criminal intent of the defendant. There is no entrapment then where the defendant already had the criminal intent, and the agents merely afforded him the opportunity to commit the crime. In other words, the root question in determining this third question—and I am taking that first for reasons which will be clear to you later—the question on that issue is this: Whose idea was it to commit the crime in the first instance? Because if it was the defendant's idea to commit the crime in the first instance, there is nothing at all wrong in the agents of the United States giving him an opportunity to go through with it. If you should find—and I do not suggest that you do—the facts are for you; nor do I suggest that you don't, it is for your decision—if you should find that it was Michelson's thought in the first instance to bribe, to offer any money, in order to influence the agent within these rules taken as a whole, then there is nothing wrong at all in the telephone calls between the agent and himself, or inviting him to the St. George for the payment of the money. In other words, who was the man in whose brain the crime originated? That is what you must decide on the issue of entrapment.

Now, the reason for that doctrine in Federal criminal enforcement law is simply this: that a man can't be convicted of a crime which he himself didn't intend to commit in the first instance and which he never would have committed if the agents hadn't inspired, incited, persuaded and

lured him to commit it. So even when a person has violated [fol. 152] the letter of the law, if that violation originated, the idea of it originated, with Government agents, then such a person is not guilty of a crime. And that in this case becomes a jury question, as I have attempted to say to you; in other words, it is for you to say in whose brain did this thought of crime originate. So if the thought orignated in the mind of the agent, even though in consequence of that later on money passed, the jury, if it is satisfied—or, to put it another way, the jury, if they are not satisfied beyond a reasonable doubt that the crime had originated in the brain of Michelson, the defendant, would pay no attention to the later transactions.

And the defendant has a right, under proper circumstances, to urge and to show by proof if he can, or to offset the Government's proof if he can, that the thought of the crime did not originate with him.

So these are the three issues that are before you for decision: The giving or offering of money, the criminal intent as outlined in the statute, and, as I have already mentioned, did the defendant originate the crime.

In all criminal cases, and in this case, the burden of proof is upon the Government from start to finish. The defendant is attended by what the books call the presumption of innocence. He is presumed to be innocent right up until the time when he is found guilty by the verdict of twelve jurors. And in consequence of that the burden of proof never shifts from the Government. So that if you entertain a reasonable doubt upon the whole case, or as to any integral elements of the case, including whether or not the agent or the defendant originated the idea of the payment of the money, it would be your duty under these rules to return a verdict of not guilty on both counts.

And that strong protection which the law affords the defendant goes even further than that. So that if you should reach the conclusion that the evidence is consistent equally with innocence and with guilt, then the Govern- [fol. 153] ment would not have established its burden, obviously, of establishing beyond a reasonable doubt that the defendant was guilty.

What does reasonable doubt mean? It is a term that has been, shall I say, sometimes the subject of bitter dispute, but really isn't a difficult concept to analyze. It does not mean a whim or caprice or anything of that kind; it means

a doubt founded upon reason and arising after a fair and impartial consideration of all the evidence in the case. If a consideration of all the evidence in the case produces in your minds an abiding conviction to a moral certainty that the defendant is guilty, the same sort of conviction that would lead you to act in your own affairs in weighty and important matters, then you haven't any reasonable doubt. In other words, it is a kind of doubt for which you could furnish a reason.

A reasonable doubt does not mean that you say to yourself, "I like the defendant, I will let him off"; or "I dislike the defendant and I won't let him off"; or "I do not like his lawyer"; or "I do like his lawyer." These are whims and caprices that don't count in the trial of a lawsuit. So that a reasonable doubt or a want of reasonable doubt will be based upon the evidence in this case, the facts.

Now, how do you get that evidence? Well, you have witnesses in the box, and you, the members of the jury, are the sole judges of which witnesses are to be believed and which witnesses, if any, are to be disbelieved, and to what extent you will accept the testimony of any witness who you think is telling the truth in part or not in part. And in that connection, just as in ordinary affairs on the outside, we have a rule of law that if you think that any witness has testified falsely wilfully to a material fact in the case, you are at liberty to disregard his entire testimony; or, if you want to, you can accept such part as appeals to your belief and reject the rest. That is what you do outside. If a man lies to you about a serious matter, and you think he did it de- [fol. 154] liberately, it is perfectly proper for you to say to yourself as a matter of common sense, "I will never believe him again," or, dealing with such a person you might say, "Yes, I will believe him when he says he was standing on the corner of Court and Montague Streets, but anything else which rests solely on his statement I won't accept." Isn't that just a matter of common sense?

There are two kinds of evidence produced by the witnesses in this case: One is the sort which deals with the facts in issue, and then the evidence of character witnesses, that is, witnesses who give evidence concerning the reputation of the defendant in the community. And character evidence, if it is believed, standing by itself, can create a reasonable doubt in your minds. But it is for you to weigh

that character evidence. And in that connection I may say to you that the weight of any bit of evidence in the case is for you and not for me or the lawyers.

In connection with the character evidence in the case I permitted a question whether or not the witness knew that in 1920 this defendant had been arrested for receiving stolen goods. I tried to give you the instruction then that that question was permitted only to test the standards of character evidence that these character witnesses seemed to have. There isn't any proof in the case that could be produced before you legally within the rules of evidence that this defendant was arrested in 1920 for receiving stolen goods, and that fact you are not to hold against him; nor are you to assume what the consequences of that arrest were. You just drive it from your mind so far as he is concerned, and take it into consideration only in weighing the evidence of the character witnesses.

I have tried to tell you that the facts in the case are for you, but, nevertheless, particularly in view of the fact that there has been a day's recess, it is not improper for me to analyze the facts briefly anyway, so long as you adhere rigidly to the admonition that if anything I say does not [fol. 155] agree with your recollection you are to take your own recollection and not mine, just as you do with the lawyers. I am not going to try to retell the evidence in detail.

Kratter, you will remember, said on July 15, 1946, he did not go to the defendant's premises, but made an investigation to discover the defendant's address. Then he said on the 16th, having located that address, he did go to the defendant's premises at 3.30 P. M. and stayed there about twenty minutes, during the course of which he called the accountant at the defendant's suggestion. Then Kratter says he went on the 17th again to that address and, after having looked at the records for an hour and a half, went out to lunch, and after lunch there was this discussion in the park, the details of which you will remember. And then finally he and Michelson parted at the subway, as Kratter was on his way home.

Then, says Kratter, on the 18th, in the afternoon, having completed an examination in the forenoon, he disclosed this matter to another agent, who advised him to report it at once to the Intelligence Unit, which Kratter said he did.

And then on the 19th, now operating under the direction of the Intelligence Unit, a neighbor of Kratter took a telephone call and Michelson furnished a telephone number. Then, on the 22nd of July, Kratter called Michelson and was told to call him back on Friday, July 26th. Then, on the 26th, Kratter said he did call Michelson back in the presence of Agent Yung and suggested that the $5,000, formerly the subject of discussion, should be delivered at a hotel, which Michelson objected to; whereupon Kratter said he would drop it, he didn't want to be involved. Then, on July 29th, occurred the incident at the St. George, the placing of the listening device, which under the circumstances of this case, standing by themselves, was perfectly proper. And then the Government attempted to have recorded the talk that occurred in that other room, the incident about the $5,000, succeeded by the arrest.

[fol. 156] Now, then you had some testimony from Agents Betts and Sherry and Young all dealing with the incidents on the 29th of July. If you will remember, it was Betts who installed the equipment, and Sherry took the transcript, and Agent Yung made the arrest after having listened to the conversation, at least until he had left the room to make the arrest.

Now, Michelson's story is entirely different. He says, as I read his testimony, the only meeting he had with Agent Kratter, outside of the 29th, anyway, and perhaps one short intervening visit, was on the 15th of July, that Monday. Then he describes the same, substantially the same incidents that Kratter had talked about as having occurred on two separate dates, namely, the 16th and the 17th, the call to the accountant, the transaction in the office, the lunch, the talk in the park. Michelson says those two sets of circumstances took place not on the 16th and 17th, respectively, but on the 15th. The significance of that, or what I think is the significance of that, I will mention in a minute.

The tenor of Michelson's testimony was that it was Kratter who first solicited the bribe, and that it was Kratter who insisted upon it, and that Kratter overbore him and frightened him, as a result of which the subsequent transactions took place.

The witness Gerstein said he was in the 74 Bowery store on the 15th of July and saw Kratter there. He said there was a little argument. He said he was 6 feet away, his

estimate being the distance from the witness box to the gate there in the courtroom. When I asked him specifically if he had heard anything about threats of the F. B. I. he said he could not hear anything. Now, I am not suggesting or attempting to make my recollection your recollection, nor am I attempting to say what weight you shall give to these things. Is that clear? I do not want to do that. I want you to be the judges of the facts as you are.

[fol. 157] The witness Osterfeld testified as to having seen Michelson on the 15th of July, and in response to a question, as I understand his testimony, he denied that Michelson had said that anyone had solicited a bribe from him.

Why do I recount this evidence? Because you have got to take this evidence, such parts of it as you accept, and decide these three issues: Did Michelson give or offer to give, or both offer and give, because that is quite possible, $5,000 to Kratter on July 29, 1946, which is alleged to have taken place in the Hotel St. George? I am going to leave that without any further comment. The second issue is, was it the intention of Michelson to influence Kratter to do something or to allow a fraud upon the United States, or to induce Kratter to violate his duty, any one of those three, on July 29, 1946? You will remember that Kratter said in connection with that issue that Michelson wanted him to straighten out his returns. And you will remember that it is also in the evidence, as I recall it, that on the 29th of July Michelson said to Kratter, "You know what to do." And it is also in the evidence, at least from the Government's side, as I recall it, that Michelson said to Kratter something about $1200 for 1942 and $900 for 1943.

On the other side of the picture, Michelson takes the position on this issue of intent that there was nothing due on the face of the return, and Kratter said he had no knowledge of anything due. Now, I tried to admonish you we are not trying the question of whether or not Michelson owed any income tax; that isn't before us. The question that is before us is a pure charge of bribery, and nothing else. The only reason that I admitted the evidence that would bear upon the amount of income tax due, if any, was in connection with helping you to decide what the probabilities are in the case. Because obviously one question is whether or not, even if there might be nothing due, it was in Michelson's mind that there was something due—and you

[fol. 158] believe it was in his mind—that might be one fact that would help you to reach a result on the question of intent.

Now, on the question of entrapment. The Government emphasizes the fact that when he was arrested Michelson never made any disclosure of this matter to Mr. Pittoni, but simply concerned himself with saying, "I can only hurt myself." Nor, said the Government, did he make any disclosure to Mr. Yung, but said, "I will tell the proper authorities." And Mr. Yung said, "I am representing the Commissioner of Internal Revenue," but there was no disclosure of any attempt at entrapment.

And in the conversation overheard at the Hotel St. George the Government claims that part of it was that Kratter said to Michelson, "I am doing this at your insistance, isn't that so?" And Michelson replied, "Yes." Then, said the Government, here is a voluntary trip to the St. George, the man coming over from New York to Brooklyn to the Hotel St. George. Does that sound like the man was so in the clutches of Kratter that he had to do a thing like that? And finally the Government said, did he or didn't he disclose to his own accountant on this occasion what had happened? Michelson said he did, so I recall it, and Osterfeld said he did not so far as the bribe is concerned, but he talked about a demand having been made for money which he, Osterfeld, considered to be for taxes.

On the other side of the picture the defendant said, what about that conversation in the park? Doesn't that sound like entrapment? And they said, why should Kratter give Michelson a card if it wasn't something of that sort? Then they say, look at the delay, if you believe us. The suggestion about a bribe took place on the 15th, and there was no disclosure, according to the Government's evidence, until the 18th, and then there were two other matters that they say bear directly on this. They say, look at this man Kratter, he just changed his job, and then they went into Kratter's finances, all of which, if I understand their point, [fol. 159] was to impress you with the fact that this thought of a bribe originated in the mind of Kratter and nobody else.

Now, you weigh evidence exactly the same as you weigh matters in your own business affairs; you consider the probabilities, which is more probable, which is more

believable, this story or that story. And in weighing the evidence of witnesses you do the same thing as you do in the ordinary walks of life; you consider their interest, you consider their demeanor, you consider the way the man says the thing. Does he say it as if he is trying to make it up, or does he give the appearance of frankness? You evaluate them as individuals on the basis of their demeanor.

Of course, Michelson is interested. The question of whether the Government agents are interested or not I leave to you to determine as a fact. And I say to you now that you are to consider the quality and not the quantity of the evidence. It would be obviously unfair if the side with the most witnesses would automatically win. You have got to bring your intelligence to bear, and your common sense.

In that connection let me say this: It is of no consequence to you what happens to Michelson in the event of a verdict of guilty on your part; that is not within your province.

And let me say this to you, that bias or prejudice of any kind is out of place. That applies to bias in favor of the Government or bias against the Government. And let me tell you why: If bias enters into a case, if sympathy enters into a case, you have got exactly the same situation. Sympathy is just one aspect, if you will, of the same thing as bias. In other words, if a guilty defendant can be acquitted today because of sympathy, then an innocent defendant can be convicted tomorrow because of bias. What does that mean? It means that you are letting your emotions run away from your judgment, you are letting your [fol. 160] heart govern your head. You do not do that in a court of law, it is too dangerous.

You have a duty to agree. Well, what do I mean by that? You have sworn that you will well and truly try the issues joined between these parties, and that means a lot. You should give heed and take counsel with your fellow members on the jury. You won't hold out for any caprice, for any arbitrary reason. And while I would not want you for a moment to relinquish or abdicate any firm conviction that you may have, yet the minority ought to give due weight and due consideration to the majority, if that happens. You understand I am not saying to you that you should relinquish any firm conviction that you have, but I do mean that you should decide this case on the evidence

in the case and that alone as you understand it and as you evaluate it.

I am not giving you this case for deliberation at this point. I am taking a recess for five minutes now.

(The jury retired.)

The Court: Now, are there any exceptions?

Mr. Castellano: I think your Honor should look at requests 12, 14 and 19.

The Court: 12?

Mr. Castellano: Yes.

The Court: I charged the jury on the question of establishing that beyond a reasonable doubt. In substance I said that they had to prove beyond a reasonable doubt that Michelson, and he alone, originated the idea.

As to No. 14, I could not without being boresome tell them again that if the idea originated in the agent's mind there should be a verdict of not guilty.

19. I didn't say anything either way on that as I remember.

Mr. Castellano: You did make a reference to it.

The Court: Oh, I said they were to consider whether they had an interest, but I didn't say whether their testimony [fol. 161] was to be given no grater credence than any other testimony. I think I should.

Mr. Castellano: There was something said by the Government in the summation about Webster's dictionary definition.

The Court: I did not hear that.

Mr. Pittoni: I drew the distinction between extortion and bribery.

The Court: You may have your exception. Do you except to my refusal to charge 19?

Mr. Castellano: Yes, your Honor.

The Court: Let me not influence you. Put your own exceptions on the record as you wish them.

Mr. Castellano: I think that your Honor stated you would charge that.

The Court: I am going to charge that a Government agent is entitled to no greater weight than any other witness.

Mr. Pittoni: You said that in effect.

Mr. Castellano: No.

Mr. Pittoni: Didn't you say in effect that it was for them to judge?

The Court; But the request goes further than that. You have no standing to except, your hands are tied.

Mr. Pittoni: I have no standing and I don't except, but I would like to say this, your Honor: Your Honor in stating the facts said that the agent never went back to Michelson's place of business after he went to lunch, after he went to the park.

The Court: I said except for one short visit, according to Michelson's story.

Mr. Pittoni: You were summarizing Kratter's testimony at that time.

The Court: No, not Kratter. I was trying to attempt to summarize Michelson's testimony.

[fol. 162] Mr. Pittoni: The way it reads now it shows that Kratter never went back to Michelson's place of business, and that is the main part of my argument with Gerstein's testimony, that Kratter went back.

The Court: According to his own evidence.

Mr. Pittoni: That is right.

The Court: Yes. Bring them back.

Is there any reason why I should mention anything about missing witnesses?

Mr. Pittoni: No.

Mr. Casteliano: No.

The Court: I do not think so.

(The jury returned to the court room.)

The Court: Members of the jury, I am about to give you this case for your decision, and I think the most significant thing I can say to you before I do that is again to remind you that you are the sole judges of the facts and the credibility of the witnesses. To show you how serious and important that is I reviewed the facts with you, and as soon as you left the court room it was called to my attention that I may have said it to you, or misled you about Kratter's visits to Michelson. Michelson said that Kratter visited him on July 15th, that is my recollection, and they spent the greater part of the day there. Kratter said that he visited Michelson briefly on the afternoon of the 16th and went back again on the 17th and spent the greater part of the day there on the 17th. Isn't that the way you remember it? That is the way I do.

Concerning the credibility of witnesses, use your common sense. It is your duty to try to find out who in your judgment is telling the truth. And all these witnesses stand equally in the eyes of the law, except perhaps in so far as interest is concerned. If you should find interest so marked on one side that it might sway the evidence, that you should take into consideration. In other words, a Government witness for example, is not entitled to any greater credence [fol. 163] than any other witness just because he is a Government agent. Is that clear? You are to decide these matters on the evidence. The interest of which we speak is an interest in the outcome of the case, and I am leaving it to you to determine how far Government witnesses may be interested in the outcome of the case. Of course, this being a criminal case the defendant is interested in the outcome.

Take this case, members of the jury, and do justice between these parties.

The alternate juror is discharged with the thanks of the Court.

(The bailiff was duly sworn and the jury retired at 1.10 P. M.)

Verdict

(The jury returned at 3.30 P. M.)

The Clerk of the Court: Members of the jury, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: In the case of United States vs. Solomon Michelson, how do you find the defendant, guilty or not guilty on count 1?

The Foreman: Guilty.

The Clerk: How do you find the defendant, guilty or not guilty on count 2?

The Foreman: Guilty.

The Clerk: Members of the jury, as the Court has received your verdict, you say you find the defendant, Solomon Michelson, guilty on both counts 1 and 2, so say you all.

Motion to Set Aside Verdict

Mr. Castellano: The defendant moves to set aside the verdict on the ground that it is contrary to the law and contrary to the evidence.

The Court: Denied.

Mr. Castellano: Exception.

The Court: Is there anything more, Mr. Castellano?

[fol. 164] Mr. Castellano: Not at this time.

The Court: The defendant may continue on bail, and I will set it for sentence on the 16th day of January.

I want to say for the record that I am appreciative of the efforts of both counsel, that they both tried the case well, and I am personally grateful to them for the cooperation I got from them.

Mr. Pittoni: Thank you very much, your Honor.

Mr. Castellano: Thank you.

IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANT'S REQUESTS TO CHARGE

1. There is no charge against the defendant relating to any violation of the income tax laws. The only charge made is one of bribery and that is the sole charge you are required to pass upon.

2. It is charged in Count I that the defendant gave $5,000 to the Agent with intent to influence his decision and action on a question and matter before him in his official capacity, and with the further intent to influence the Agent to collude in and allow a fraud on the United States, and with the further intent to induce him to do an act in viola- [fol. 165] tion of his duty. In Count II the charge is made that the defendant offered to give the money with the same intent.

3. There can be no conviction unless the criminal intent is established and the criminal intent charged here is in three parts, to influence the decision of the Agent in the matter pending before him, to influence the Agent to collude in and allow a fraud on the United States, and the final intent to induce him to do an act in violation of his duty with reference to the defendant's income tax returns. This is the intent charged in the indictment and the Government must establish such intent beyond a reasonable doubt before you can convict.

4. In determining the criminal intent if any existed, you must therefore decide (1) was there a matter pending before the Agent in his official capacity, (2) did any facts exist from which you can draw the conclusion that the defendant desired to influence the Agent to collude in and allow a fraud on the Government, and (3) did any facts exist from which you can draw the inference that the defendant intended that the Agent violate his duty in reference to the defendant's income tax returns. If you find that such intent as charged in the indictment did not exist you must return a verdict of not guilty.

5. The first duties of Government Agents and Officers is to prevent crime, and not to punish crime. It is not the duty of Government Officers to incite, instigate, or cause the commission of a crime for the sole purpose of prosecuting and punishing it.

6. It is contrary to public policy and to establish law to punish a man for the commission of a crime which he would never have committed if the Agents and Officers of [fol. 166] the law had not inspired, incited, persuaded and lured him to commit it.

7. The law should receive a sensible construction, and while a person may appear to have violated the letter of the law, if it appears that such violation originated with and was brought about by the acts of the Government Agent, it is the duty of the jury to find such person not guilty in order to prevent the injustice which would result from a conviction.

8. The trial Judge and you members of the trial jury are only advised as to the facts in every case when they are developed at the trial. If the trial shows an issue of fact as to whether the Agent originated the idea of the money payment or whether the idea originated with the defendant, it becomes the duty of the Court to submit that question to the jury along with other questions that arise in the case.

9. Even though the evidence shows that the money did pass to the Agent from the defendant it still becomes the duty of the jury to determine who originated the idea for the delivery and payment of this money. The mere delivery or payment of the money is insufficient to convict because if you believe that the idea originated with the Agent, it

should become your duty to acquit the defendant. Any other verdict would lead to an absurd and unjust result which would be contrary to the intent of Congress in passing the bribery law.

10. The defendant has the right to avail himself of the defense that he was induced by the Agent to make the payment, such defense is available even though the defendant made the payment, as the Government cannot be permitted to obtain a conviction for a crime if it appears that the Government Officers are the instigators of the defendant's conduct.

[fol. 167] 11. The fact that the defendant paid a fine of $100.00 twenty years ago in the Court of Special Sessions on his misdemeanor conviction for keeping and offering for sale watch dials to which were affixed the false trade mark of the Waltham Watch Co. must not be considered as evidence indicating guilt on the bribery charge under this indictment. We are here dealing only with a bribery charge and there is no evidence that the defendant at any other time or on any other occasion offered or gave money to any person for any unlawful purpose.

12. If you entertain a reasonable doubt as to whether the criminal design in this case originated with the Agent of the Government or with the defendant, you must return a verdict of not guilty on both counts of the indictment.

13. Defendant contends that the criminal design here originated with the Agent upon the Agent's first visit to defendant's place of business and that the Agent implanted in defendant's mind the idea of paying over $5,000 in cash. You have heard the evidence relating to this first visit by the Agent when two cards with the name of the Agent and his Revenue Office address printed thereon. One card has the Agent's home telephone number written in pencil thereon. The Agent admitted writing his residence telephone on one card which he wrote at the store of defendant and gave it to defendant. You have the duty to consider this evidence in determining who proposed the idea of paying money for any unlawful purpose. If you find the idea originated in the mind of the Agent and was proposed by him you must return a verdict of not guilty on both counts. If you have a reasonable doubt on this question you must return a verdict of not guilty on both counts.

Likewise you must consider the other evidence, including the lunch, the walk to the park and the conference in the park. You may properly ask, are these the usual methods [fol. 168] of performing the duties of a Government official or was it all part of the official's plan to induce and cause a payment of money upon which to base a prosecution, if it was a plan of the Agent, you must acquit the defendant.

14. If you find that the criminal design originated with the Agent or you have a reasonable doubt on the question, you need go no further. Under such circumstances you must find defendant not guilty on both counts.

15. If you find the criminal design originated with the Agent, then any criminal design or intent of defendant to pay the money as a bribe after the proposal by the Agent becomes immaterial, and the defendant must be acquitted. He cannot be convicted if he acquiesced and agreed to the suggestion of the Agent.

16. The amounts of money involved here or the purpose of defendant in delivering it to the Agent becomes immaterial and you must acquit the defendant if you find the payment or delivery of cash originated in the mind of the Agent and he was the first one to propose the idea.

17. The indictment itself cannot be considered as proof of guilt, it is merely a charge that is made against the defendant.

18. The defendant is presumed to be innocent and the burden rests upon the Government throughout the trial to prove that the defendant committed the crimes charged beyond a reasonable doubt. This burden never shifts and always remains upon the Government. If you entertain a reasonable doubt upon the whole case, or as to the intent of the defendant, or as to whether the Agent or the defendant originated the idea of the payment you must return a verdict of not guilty on both counts. If the evidence is [fol. 169] as consistent with innocence as with guilt you must acquit the defendant.

19. The testimony of a Government Agent is not entitled to any more consideration than any other witness. The fact that he is employed by the Government does not warrant you in attaching more importance to his testimony than that which you accord to other witnesses.

20. Character witnesses have been called by the defendant. I charge you that such evidence as to the defendant's reputation when considered with the other evidence in the case may be sufficient to create a reasonable doubt as to the guilt of the defendant. If you find that you have such a reasonable doubt as to the guilt of the defendant after considering the testimony of the character witnesses and the other evidence in the case, then you must return a verdict of not guilty on both counts.

21. During your deliberations you members of the jury are required to go over the case and the evidence, and to confer with one another. If a juror reaches a conclusion which he believes is based upon the evidence, and he is convinced that his conclusion is correct, such juror has no right to reach any other conclusion simply because other jurors ask him to do so. Your report to the Court is either a verdict or a report that you cannot agree upon a verdict.

[fol. 170] GOVERNMENT'S EXHIBIT 1

Card of Maurice M. Kratter with telephone number.

GOVERNMENT'S EXHIBIT 2

"Daily report of official duties performed" for July 15, 1946, July 16, 1946, and July 17, 1946.

GOVERNMENT'S EXHIBIT 3 FOR IDENTIFICATION

Slip of paper with telephone number.

GOVERNMENT'S EXHIBIT 4 FOR IDENTIFICATION

Transcript of notes taken by Mr. Sherry.

GOVERNMENT'S EXHIBIT 5

Package containing $5,000.

DEFENDANT'S EXHIBIT A

Card of Maurice M. Kratter.

DEFENDANT'S EXHIBIT B

Yellow sheet with telephone number.

[fol. 171] IN DISTRICT COURT OF THE UNITED STATES

No. 41165

UNITED STATES

v.

SOLOMON MICHELSON

Criminal in two (2) counts for violation of U. S. C., Title 18, Sec. 91

JUDGMENT AND COMMITMENT

On this 16th day of January, 1947, came the United States Attorney, and the defendant Solomon Michelson appearing in proper person, by Counsel, and

The defendant having been convicted on a verdict of guilty of the offense charged in the indictment in the above-entitled cause, to wit: within the Eastern District of New York on or about July 29, 1946, did give $5,000 to an officer acting for and on behalf of the United States in an official function under the authority of the Treasury Dept., with intent to influence the decision of said Internal Revenue Agent on a question in respect to defendant's income tax returns, then pending before him in his official capacity; and did offer said Internal Revenue Agent $5,000 with intent to influence his decision on the above matter and question of defendant's income tax returns and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of eighteen (18) months and to pay a fine of $1.00 on Count I and to be imprisoned for 18 months and to pay a fine of $2,500 on Count II; and to stand committed until said fines be [fol. 172] paid or he be otherwise discharged as provided by law, without costs. Sentence of imprisonment on each count to run concurrently.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States

Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) Harold M. Kennedy, United States District Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

Name and address of appellant: Solomon Michelson, 3152 Brighton 6th Street, Brooklyn, New York.

Name and address of appellant's attorney: Louis J. Castellano, 32 Court Street, Brooklyn, New York.

[fol. 173] Offense: Bribery, Title 18 U. S. C. 91, Count I charges giving $5,000 to an Internal Revenue Agent. Count II charges that the defendant did offer a sum of money $5,000 to an Internal Revenue Agent in violation of Section 91, Title 18 U. S. C.

Date of judgment: January 16th, 1947.

Description of judgment or sentence: Count I—Imprisonment for term of 18 months. Fine $1.00. Count II—Imprisonment for term of 18 months. Fine $2,500. Prison sentences to run concurrently on both Counts.

Name of prison where confined, if not on bail: Defendant admitted to bail pending appeal.

[fol. 174] I, Solomon Michelson, appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment above mentioned on the grounds set forth below.

Dated January 16th, 1947.

Solomon Michelson, Appellant.

GROUNDS OF APPEAL

1. The Court erred in admitting evidence relating to an arrest of defendant in 1920.

2. The Court erred in its charge to the jury relating to the statutory intent required to be proved under the specific language of the indictment which charged three separate purposes.

3. The Court erred in admitting testimony with reference to conversations and income tax liability of the defendant.

4. The Court erred in denying defendant's application for a mistrial.

5. The Court erred in refusing to charge the jury in the language of certain requests to charge submitted by the defendant.

[fol. 175] In United States District Court

[Title omitted]

Stipulation as to Record and Exhibits

It is hereby stipulated and agreed that the foregoing record contains a true copy of the indictment, notice of appeal, Clerk's record of proceedings, judgment, transcript of the evidence and proceedings had at the trial, requests to charge, and constitutes the record on appeal as agreed upon by the parties; and that the record has been prepared and filed within the time allowed by law and the Court.

The parties further agree that said record may be filed as the record on appeal, and certified by the Clerk of this Court as the record on appeal herein.

The parties further agree that the exhibits need not be made a part of the record and that the original exhibits or photostatic copies thereof may be used upon the argument of the appeal.

April 1, 1947.

J. Vincent Keogh, United States Attorney, Eastern District of New York, by Mario Pittoni, Assistant United States Attorney; Louis J. Castellano, Attorney for Solomon Michelson, Defendant-Appellant.

[fol. 176] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 177] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1947

No. 130

(Argued January 8, 1948. Decided January 26, 1948)

Docket No. 20818

UNITED STATES OF AMERICA, Appellee,

v.

SOLOMON MICHELSON, Defendant-Appellant

Before Swan, Chase and Frank, Circuit Judges

Appeal from a judgment of conviction, on two counts, entered by the United States District Court for the Eastern District of New York. Affirmed as to the First Count; Reversed as to the Second Count.

J. Vincent Keogh (Mario Pittoni, of counsel), for appellee.

Louis J. Castellano (Brooklyn, N. Y.), for appellant.

[fol. 178] Defendant was indicted and tried in the Eastern District of New York for violation of 18 U. S. C. A. § 91 which provides in part as follows: "Whoever shall promise, offer, or give, * * * any money or other thing of value, * * * to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, * * * with intent to influence his decision or action on any question, matter, cause or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made or tendered, or caused or procured to be so offered, promised, given, made or tendered, and imprisoned not more than three years."

The first count of the indictment reads: "That on or about the 29th day of July, 1946, within the Eastern District of New York, the above named defendant, Solomon Michelson, did give a sum of money, to wit: Five Thousand Dollars ($5,000.00), to an officer and a person acting for and on behalf of the United States in an official function under the authority of the Treasury Department, to wit: Maurice M. Kratter, Internal Revenue Agent, with intent to influence his decision and action on a question and matter then pending before him in his official capacity, with intent to influence said Internal Revenue Agent to collude in and allow a fraud on the United States and to induce him to do an act in violation of his lawful duty in respect to the defendant's income tax return. (Title 18, United States Code, Section [fol. 179] 91.)" The second count is identical with the first, except that the words "to offer" are substituted for the word "give." The jury found defendant guilty on both counts. The judge sentenced him to imprisonment for eighteen months on the first, and to imprisonment for eighteen months and a fine of $2,500 on the second, the prison sentences to run concurrently.

FRANK, Circuit Judge:

The Second Count

We think that Congress, as it lawfully may, provided that to "offer" a bribe and to "give" a bribe are two distinct crimes even when parts of a single transaction, since the one (to "give" involves an element which the other (to "offer") does not.[1] The test, as stated in *Morgan* v. *Devine*, 237 U. S. 632, 640, is whether "separate acts have been committed with the requisite criminal intent. * * *" The present case does not meet that test. Kratter, the principal government witness, testified as follows: On July 17, 1946, in

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[1] *Blockburger* v. *United States*, 284 U. S. 299, 303-304; *Albrecht* v. *United States*, 273 U. S. 1, 11; *Burton* v. *United States*, 202 U. S. 344, 377; *Morgan* v. *Devine*, 237 U. S. 632, 640; *Gavieres* v. *United States*, 220 U. S. 338, 342; *Lindsay* v. *United States*, 134 F. (2d) 960, 961 (C. C. A. 10); *cf. American Tobacco Co.* v. *United States*, 328 U. S. 781, 787-788.

New York City,[2] defendant offered him a bribe of $5,000, and he told defendant he would take it.[3] Defendant then [fol. 180] said that, when he had the money, he would telephone Kratter. On July 26, defendant, on the telephone, told Kratter that he had the money and wanted to meet Kratter to give it to him. On July 29, Kratter by phone, arranged with defendant for a meeting at a room in the St. George Hotel in Brooklyn.[4] Kratter went to that room. His own words, as to what then occurred, follow: "A few minutes later there was a knock on the door. I opened the door and Mr. Michelson came in, and I closed the door after him. He dropped a package on a dresser or chifferobe, something like that that was in the hotel room, and he sat down and I sat down. I asked him if he had the money, and he said, 'Yes, it is in the bag over there.' I took the bag, unwrapped it, and he took out a large number of five, ten and twenty-dollar bills, and he said, Mr. Michelson said, 'There is $5,000 there.' I made a quick count of the bills and satisfied myself that there was approximately $5,000

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[2] New York City is in the Southern District of New York.

[3] Kratter's testimony as to that conversation is as follows:

"Q. Did you and Mr. Michelson have a conversation while you were walking along together? A. Yes, a conversation ensued during the walk. Mr. Michelson kept insisting that I do something to straighten out his tax return and fix things up for him so he wouldn't get into too much trouble. He offered me $3,000 while we were walking toward the subway, and then he said, 'Make it $5,000.' I told him I wouldn't touch that kind of money, I wasn't interested in it, I didn't want to get mixed up in that situation. Then he kept insisting. We had walked about two or three blocks from his office, and I finally stopped in the street and kept talking to him. He refused to leave me, and insisted that we come to some sort of agreement regarding his tax situation. I finally told him—he said, 'Will you take $5,000?' And he told me he would pay another $5,000 to the Government. I finally said 'O. K.,' in order to get away from him, and he told me he would call me up when he had the money, and he asked me for my business card and home telephone. I gave him one of my cards and wrote down the phone number while we were standing on the street, and then we parted."

[4] Brooklyn is in the Eastern District of New York.

in the package * * *." Defendant's conduct at that meeting in Brooklyn constituted his performance of the agreement of July 17—an illegal bargain resulting from a previously accepted offer—to give the $5,000 bribe. He did not [fol. 181] on that day or at any other time in the Eastern District both offer and give. He merely gave.[5]

The offer of July 17 cannot sustain the conviction on count 2. For defendant made that offer in New York City in the Southern District, and the defendant was indicted and tried in the Eastern District. Had that offer been specified in the indictment, defendant, thus warned of the improper venue, would have waived the lack of proper venue by going to trial without interposing an objection.[6] The same might have been true if, during the trial, defendant had in some manner been put on notice that the government intended to rely on that New York City offer as a crime, for which he was being tried. But here there was nothing so to notify him. Indeed, the trial judge, in his charge, told the jury that the issue was whether defendant gave or offered to give, or both, $5,000 to Kratter on July 29 at the Hotel St. George. We therefore conclude that we must reverse as to the second count.

Alleged Errors as to the First Count

1. The defendant called three character witnesses who testified that he had an excellent reputation for "honesty, truthfulness and being a law-abiding citizen." On cross-examination, they were asked whether they had heard (a) that in 1927 he had been convicted in a New York court

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[5] Kratter testified that after he had thus received the money, "I asked Mr. Michelson what he wanted me to do for the money, and he told me he wanted me to turn in a report which would indicate that he owed about $1,200 on his 1943 tax return and about $900 on his 1942 return. He said that was all he wanted me to do. Then I told him, 'You understand the only reason I am doing this is because you insist upon it, isn't that so?' And he said, 'Yes, that is right.'"

This conversation did not show a new offer but merely arrangements for carrying out the details of the previous agreement.

[6] *United States* v. *Jones*, 162 F. (2d) 72 (C. C. A. 2).

[fol. 182] and sentenced to pay a fine of $100 or 30 days in jail, and (b) that in 1920 he had been arrested for receiving stolen goods.

The judge, out of the jury's presence, received the assurance of the government's counsel that defendant had been thus arrested in 1920. The defendant, on the witness-stand, had previously admitted the conviction in 1927. The judge, when these witnesses were being questioned, said: "However, I instruct the jury that what is happening now is this: the defendant has called character witnesses, and the basis for the evidence given by those character witnesses is the reputation of the defendant in the community, and since the defendant tenders the issue of his reputation the prosecution may ask the witness if she has heard of various incidents in his career. I say to you that regardless of her answer you are not to assume that the incidents asked about actually took place. All that is happening is that this witness' standard of opinion of the reputation of the defendant is being tested. Is that clear?" In his charge to the jury, the judge said: "In connection with the character evidence in the case I permitted a question whether or not the witness knew that in 1920 this defendant had been arrested for receiving stolen goods. I tried to give you the instruction then that that question was permitted only to test the standards of character evidence that these character witnesses seemed to have. There isn't any proof in the case that could be produced before you legally within the rules of evidence that this defendant was arrested in 1920 for receiving stolen goods, and that fact you are not to hold against him; nor are you to assume what the consequences of that arrest were. You just drive it from your mind so far as he is concerned, and take it into consideration only in weighing the evidence of the character witnesses." The questions were of the kind often [fol. 183] held proper in examining "character witnesses."[7] That being the rule, we see no abuse of discretion in permitting them to be asked here.[8] Defendant asserts error in

[7] See, *e. g.*, *Mannix* v. *United States*, 140 F. (2d) 250, 252 (C. C. A. 4); *Josey* v. *United States*, 135 F. (2d) 809, 811 (App. D. C.); *Spalitto* v. *United States*, 39 F. (2d) 782, 785-787 (C. C. A. 8); *cf. Stewart* v. *United States*, 104 F. (2d) 234, 235 (App. D. C.).

[8] Wigmore, *Evidence* (3d ed. 1940) § 988, after noting that

putting the question about the 1920 arrest to a witness who had known defendant only since 1932. We cannot agree, for she might have heard rumors of an arrest which happened before she knew him.

[fol. 184] 3. On direct examination by his own counsel, defendant testified to his conviction in 1927 on a charge of possessing counterfeit watch-dials, but that he had no other trouble since he had been in the United States. On cross-examination, defendant testified that, in 1930, in an application signed by him for a license for vending second-hand jewelry, he had never been arrested for any offense. Thereupon he was asked whether he had stated in this application that he had been convicted of "counterfeiting trade-marks on watches." His counsel objected on the ground that the conviction had been for "possession of counterfeit." The court said, "Sustained on that ground." Government counsel then asked, "You did not say in that paper that you had been arrested and that you were convicted of that charge?" No objection was made. We find no prejudicial error.

4. Defendant complains that the judge in his charge unfairly interpreted the testimony of a witness, Osterfeld,

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"such inquiries are almost universally admitted," not as "impeachment by extrinsic testimony of particular acts of misconduct," but as means of testing the character "witness' grounds of knowledge," continues with these comments: "But the serious objection to them is that practically the above distinction—between rumors of such conduct, as affecting reputation, and the fact of it as violating the rule against particular facts—cannot be maintained in the mind of the jury. The rumor of the misconduct, when admitted, goes far, in spite of all theory and of the judge's charge, towards fixing the misconduct as a fact upon the other person, and thus does three improper things,—(1) it violates the fundamental rule of fairness that prohibits the use of such facts, (2) it gets at them by hearsay only, and not by trustworthy testimony, and (3) it leaves the other person no means of defending himself by denial or explanation, such as he would otherwise have had if the rule had allowed that conduct to be made the subject of an issue. Moreover, these are not occurrences of possibility, but of daily practice. This method of inquiry on cross-examination is frequently resorted to by counsel for the

in a manner prejudicial to defendant. We think the interpretation not unfair. But, even assuming the contrary, there is no reversible error. In the first place, defendant did not object to this part of the charge.[9] In the second place, the judge made it plain that, despite his comments on the evidence, the jury were to rely on their own recollection of the evidence.

Affirmed as to the first count; Reversed as to the second.

[fol. 185] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 26th day of January, one thousand nine hundred and forty-eight.

Present: Hon. Thomas W. Swan, Hon. Harrie B. Chase, Hon. Jerome N. Frank, Circuit Judges.

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very purpose of injuring by indirection a character which they are forbidden directly to attack in that way; they rely upon the mere putting of the question (not caring that it is answered negatively) to convey their covert insinuation. The value of the injury for testing purposes is often so small and the opportunities of its abuse by underhand ways are so great that the practice may amount to little more than a mere subterfuge, and should be strictly supervised by forbidding it to counsel who do not use it in good faith."

Because, as Wigmore says, the jury almost surely cannot comprehend the judge's limiting instruction, the writer of this opinion wishes that the United States Supreme Court would tell us to follow what appears to be the Illinois rule, *i.e.*, that such questions are improper unless they relate to offenses similar to those for which the defendant is on trial. See *Aiken* v. *People*, 183 Ill. 215, 55 N. E. 695; *cf.* *People* v. *Hannon*, 381 Ill. 206, 44 N. E. (2d) 923.

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[9] See *United States* v. *Marino*, 141 F. (2d) 771 (C. C. A. 2). Nor did he object to a question the judge put to that witness, a question, moreover, which we think entirely proper.

UNITED STATES, Plaintiff-Appellee,

v.

SOLOMON MICHELSON, Defendant-Appellant

Appeal from the District Court of the United States for the Eastern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed as to the first count; reversed as to the second in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 186] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States v. Solomon Michelson. Judgment. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 26, 1948. Alexander M. Bell, Clerk.

[fol. 187] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 188] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 5, 1948

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the procedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 52,842. U. S. Circuit Court of Appeals, Second Circuit. Term No. 612. Solomon Michelson, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed February 20, 1948. Term No. 612 O. T. 1947.

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IN THE

Supreme Court of the United States

October Term ~~1947~~ 48
No. [redacted] 23

SOLOMON MICHELSON,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION

LOUIS J. CASTELLANO,
Attorney for Petitioner.

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POINT I—The questions put by the prosecuting attorney to defendant's character witnesses respecting the defendant's arrest on a charge of receiving stolen goods were unwarranted, unfair and highly prejudicial. The Trial Judge should have adhered firmly to his original ruling sustaining the defendant's objections to those questions. The Trial Judge erred in charging his holding and overruling such objections, and further erred in his instructions to the jury respecting the insinuation conveyed by such questions	13
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IN THE

Supreme Court of the United States

October Term 1947

No.

—o—

SOLOMON MICHELSON,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, SOLOMON MICHELSON, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered herein on the 26th day of January, 1948, in so far as the judgment affirms petitioner's conviction under the first count of the indictment; and represents to the Court:—

First: By an indictment (2-3)[1], containing two counts, filed on September 3, 1946, in the office of the Clerk of the

[1] (Numerals in parenthesis in this petition and in the annexed brief refers to pages of the record unless otherwise stated.)

United States District Court for the Eastern District of New York, the petitioner herein, Solomon Michelson, was charged in the first count, in substance, with giving a sum of money, to wit, Five Thousand Dollars ($5,000), to Maurice M. Kratter, Internal Revenue Agent, on or about July 29th, 1946, as a bribe, with intent to influence said agent's action in a matter pending before him in his official capacity; and in the second count with offering a like sum to the same agent with like intent on the same day.

Second: Petitioner pleaded not guilty to the said indictment and a trial of the issues thus presented was had on December 9th and 10, 1946, before Honorable Robert A. Inch, District Judge. The trial resulted in a disagreement by the jury and a mistrial. A second trial was had before Honorable Harold M. Kennedy, District Judge, and a jury. A verdict of guilty on both counts was returned by the jury. The District Court, on January 16, 1947, imposed sentence of imprisonment upon petitioner for 18 months upon each count, the sentences to run concurrently, and further imposed a fine of $1.00 on count one and a fine of $2,500 on count two. On the same day judgment of conviction, accordingly, was filed in the Office of the Clerk of the said District Court.

Third: Petitioner duly appealed from the said sentence and judgment of conviction to the United States Circuit Court of Appeals for the Second Circuit, which Court, after hearing, rendered its decision on January 26, 1948, affirming said judgment of conviction under the first count for giving the bribe, and reversing said judgment of con-

viction under the second count for offering the bribe, on the ground the two separate crimes charged were not proved, since, upon the evidence defendant merely gave the bribe.

Fourth: This petition seeks a review of so much of the judgment of the Circuit Court of Appeals as affirms the conviction of petitioner under the first count of the indictment.

Jurisdiction

The original jurisdiction of the United States District Court in this case is based upon the statute referred to in the indictment, viz., United States Code, Title 18, Section 91.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. Code, Section 347 (a)), and Rule 38 of the Rules of this Court.

Opinions Below

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals appears in the certified record filed herein in the office of the Clerk of this Court (177-184), and is printed in Appendix B, annexed to the brief in support of this petition.

Statement of the Matter Involved

The corrupt bargain and the payment by the petitioner to the Government Agent, Kratter, resulted from visits of Kratter to the petitioner's place of business and conversations between them respecting certain income tax returns filed by petitioner for previous years.

The principal issue and virtually the only issue presented at the trial was as to whether that bargain and payment were initiated by suggestions and threats on the part of Kratter, the Agent, or by proposals emanating in the first instance from the petitioner. Upon the testimony of the petitioner and his witnesses, supporting the former version, there was clearly coercion and entrapment inducing the payment which is the subject of the indictment. According to Kratter's version, the original suggestion was made by the petitioner.

This controversy was by no means merely colorable. The petitioner's version of the occurrence was supported in part by disinterested witnesses and by admitted circumstances. The closeness of the question involved—and the resulting importance of errors in the conduct of the trial—is manifest upon a reading of the testimony and is attested by the disagreement of the jury at the first trial.

The principal question of law presented at the trial and on appeal concerned the rulings of the Court permitting the prosecutor to introduce insinuations of an old unproved charge against the petitioner by questions put during the cross-examination of character witnesses. The questions put by the prosecuting attorney to defendant's character

witnesses concerned an arrest—not a conviction—of defendant which had occurred twenty-six years before the trial. The questions were admitted as "testing the standards" of the character witnesses in accordance with a supposed rule which has been strongly criticised by high text authority and has never been approved by this Court. The Circuit Court of Appeals apparently regarded this rule as established. The Judge writing the opinion, however, expressed his own dissatisfaction with the rule and his agreement with the contrary view expressed by Professor Wigmore. Upon this point the opinion of the Circuit Court of Appeals contains the following (183, footnote No. 8 of opinion):

> "Because, as Wigmore says, the jury almost surely cannot comprehend the judge's limiting instruction, the writer of this opinion wishes that the United States Supreme Court would tell us to follow what appears to be the Illinois rule, i.e., that such questions are improper unless they relate to offenses similar to those for which the defendant is on trial. See Aiken v. People, 183 Ill. 215, 55 N. E. 695; cf. People v. Hannon, 381 Ill. 206, 44 N. E. (2d) 923."

Questions Presented

(1) Whether the questions put by the prosecuting attorney to defendant's character witnesses respecting the *arrest* of defendant, which occurred twenty-six years before the trial, were proper cross-examination.

(2) Whether the Trial Judge, after first sustaining the objections interposed to such questions on cross-examination, erred in assuming that the decisions, upon the basis of

which he reversed his previous holding, laid down an inflexible rule of law, requiring him to overrule the petitioner's objections and leaving him without discretion to exclude such questions.

Reasons for Granting Writ of Certiorari

(1) It is desirable that the existing conflict of authority respecting cross-examination of character witnesses, which the Circuit Court of Appeals felt compelled to follow, be set at rest by a decision of this Court. The rule applied in the case at bar has never been sanctioned by any decision of this Court and, because of its objectionable features and mischievous results, should be authoritatively disapproved. In any event this Court should examine the suggestion of the Court below "that such questions are improper unless they relate to offenses similar to those for which the defendant is on trial."

(2) The rule itself and the decisions supporting it were erroneously interpreted as importing a rigid requirement that questions such as those to which objection was made herein must be admitted and that there was no discretion on the part of the Trial Court to exclude them under circumstances indicating that in the particular case concerned the effect of such questions would be wholly mischievous.

(3) The errors at the trial were plainly prejudicial, because they concerned directly the one determining issue, viz., entrapment and, in view of the closeness of the controversy, may well have accounted for the verdict rendered against the petitioner.

The Statute Involved

The statute involved is set forth in Appendix A.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, directing that Court to certify and send to this Court for its review and determination on a day to be named in such writ a full and complete transcript of the record and all proceedings of such Court herein, being the case entitled in said Circuit Court of Appeals, "United States Circuit Court of Appeals for the Second Circuit, United States of America, Appellee, v. Solomon Michelson, Defendant-Appellant, bearing No. 130, October Term, 1947"; and that the part of the judgment of such Court as affirmed petitioner's conviction on the first count of the indictment be reviewed by this Court; and that petitioner have such other or further relief as to this Court may seem proper.

SOLOMON MICHELSON,
Petitioner.

LOUIS J. CASTELLANO,
Attorney for Petitioner.

Affidavit of Petitioner and Certification of Counsel

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

SOLOMON MICHELSON, being duly sworn, says: I am the petitioner herein. I have read the foregoing petition subscribed by me and know the contents thereof. The facts therein stated are true to the best of my knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

SOLOMON MICHELSON

Sworn to before me this
16th day of February, 1948.

GEORGE H. HINCK
Notary Public, State of New York
Qns. Co. Clk's No. 525
Kings Co. Clk's No. 63,
Term Expires March 30, 1949.

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which petition should be granted.

LOUIS J. CASTELLANO,
Attorney for Petitioner,
Brooklyn, New York.

Dated, Brooklyn, New York,
February 16th, 1948.

IN THE

Supreme Court of the United States

October Term 1947

No.

SOLOMON MICHELSON,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinions Below

No opinion has been rendered by the District Court. The opinion of the Circuit Court has not been officially reported at the time of the writing of this brief but a copy thereof is annexed hereto as Exhibit B.

Jurisdiction

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 347 (a)).

Statement

On January 26, 1948, the Circuit Court of Appeals for the Second Circuit, unanimously affirmed the judgment of conviction rendered under the *first count* of the indictment herein upon a verdict returned after trial before Honorable Harold M. Kennedy, United States District Judge, and a jury.

The judgment of conviction on the second count was reversed by the Circuit Court and, of course, no question is involved as to that count upon this application.

Facts

For the purpose of making clear the prejudicial effect of the rulings of the trial Court to which the petitioner herein (the defendant below and hereafter referred to as defendant), interposed objections, a brief summary of certain evidentiary details is necessary.

The evidence concerned, principally, the issue of entrapment. The testimony relating to this issue does not present the frequently encountered colorable and strained effort of a defendant to charge officers of the law with having initiated the guilty purpose, but a circumstantial narrative of solicitation and intimidation, corroborated in important details by disinterested witnesses, exhibits and admissions by the Agent, from which a jury might well find that the first suggestion of a money payment came from the Revenue Agent, accompanied with the threat of unpleasant alternative in the event of refusal.

The defendant was a licensed retail dealer in second-hand jewelry, whose place of business was at 74 Bowery, in the Borough of Manhattan, New York City (10-11), where various other jewelry dealers also had space for the conduct of their business (31).

According to the evidence, both of the Government and of the defendant, the first mention of any payment of money by the defendant to Kratter occurred after Kratter had begun, but before he had completed, an examination of the defendant's books for the purpose of determining whether the defendant's tax returns for the years 1942 and 1943 were correct (8, 10-13). According to the testimony on both sides, that suggestion was made when only a comparatively small part of Kratter's examination of the defendant's records had been completed. Both agree, also, that defendant on the same day at his place of business handed Kratter a package of money which, defendant said, contained $800. Defendant said that he did so because Kratter at that stage had demanded that amount (83-4). Kratter denied making the demand and said that defendant on his own initiative offered the money after persuading Kratter to agree to accept it (16, 37). Kratter testified at one time that he agreed to accept $1,000 (36), and at another that he agreed to accept $800 (16) and at another that he agreed to accept $5,000 (39-40). According both to Kratter and defendant, they went to lunch together and, after lunch, sat together in the park for forty five minutes (36) discussing the matter of the proposed payment instead of returning to the office at once to complete the examination of the books (111-19, 83-4, 87-8).

Kratter attributed this delay to the defendant's insistence that an understanding be reached while the defendant testified that it was because Kratter was pressing his demand for a payment. At any rate, after this corrupt negotiation, Kratter gave defendant his card with his home telephone number and did not at once report the matter to his superior (19, 40-1).

The testimony of Kratter and of the defendant is in sharp contradiction as to the date of Kratter's visit to defendant's place of business during which the payment was discussed. Kratter states that it was on Wednesday, the 17th of July, 1946 (10-11). The defendant testified that it was on Monday, July 15th, 1946, the first day upon which he was back in his office after a two weeks' absence therefrom on vacation (81-4). The importance of this contradiction is that Kratter admittedly did not communicate with anyone in his office respecting his discussions with the defendant until Thursday, July 18th, 1946, and did not communicate with his superior, Special Agent Yung, until Friday, July 19th (21, 65, 71).

If Kratter's arrangement with defendant was made on Monday, July 15th, it was obviously difficult for him to explain consistently with his own innocence why he gave defendant his home telephone number and thereafter waited four days before reporting the matter to his superior. That delay would accord far more naturally with the defendant's version that Kratter himself initiated the negotiation and brought it to the attention of Agent Yung only after deciding to abandon the idea following his talk on the afternoon of Thursday, the 18th, with his older associate, Rubinstein, who was not called as a witness.

Finally Kratter made an appointment with defendant at a room in a Brooklyn hotel where the money was given by defendant to Kratter (2629, 93-94). A listening device had been installed in that room so that the conversation was transmitted to another room nearby in which other Government Agents had stationed themselves. The report of the stenographer as to the conversation was of little value as he was unable to record the entire conversation (60-62). It contained nothing calculated to enlighten the triers of the fact as to who originated the unlawful purpose.

POINT I

The questions put by the prosecuting attorney to defendant's character witnesses respecting the defendant's arrest on a charge of receiving stolen goods were unwarranted, unfair and highly prejudicial. The Trial Judge should have adhered firmly to his original ruling sustaining the defendant's objections to those questions. The Trial Judge erred in changing his holding and overruling such objections, and further erred in his instructions to the jury respecting the insinuations conveyed by such questions.

The first introduction of this objectionable matter at the present trial occurred in the prosecutor's cross-examination of Miss Mary E. Kirk (126), the first character witness called on behalf of the defendant. She was asked (127):

> "Q. Did you ever hear — A. No.
>
> Q. (Continuing) — that on October 11, 1920, the defendant, Solomon Michelson, was arrested for receiving stolen goods? A. No.

Mr. Castellano: I object to that.

The Court: I sustain it.

Mr. Castellano: I move for a mistrial; I do not think it is proper.

Mr. Pittoni: I just gave you a memorandum, I just gave you a memo on that.

The Court: I overrule the objection on the basis of United States v. Comerford, 64 Fed. (2) 28, and Stewart v. United States, 104 Fed. (2d) 234, and other cases. However, I instruct the jury that what is happening now is this: the defendant has called character witnesses, and the basis for the evidence given by those character witnesses is the reputation of the defendant in the community, and since the defendant tenders the issue of his reputation the prosecution may ask the witness if she has heard of various incidents in his career. I say to you that regardless of her answer you are not to assume that the incidents asked about actually took place. All that is happening is that this witness' standard of opinion of the reputation of the defendant is being tested. Is that clear?

Mr. Castellano: Exception.

(Last question and answer repeated.)

The Court: Any other questions?

Mr. Pittoni: No other questions.

(Witness excused)"

That the only substantial effect of this inquiry in the case at bar was to make known to the jury that the defendant had been charged on a previous occasion more than a quarter of a century earlier with a very serious offense is too clear to admit of debate. This supposed testing of the "standard of opinion" of the witness is simply a method

of destroying character testimony, nothing more and nothing less.

The question should have been promptly excluded and the jury cautioned in emphatic terms to pay no attention to such inquiry for any reason or with respect to any issue. It is doubtful if even such a cautionary instruction could have been made strong enough to cure the damage wrought by the mere inquiry and to justify denying the motion for mistrial, but that question is not presented here because the Trial Judge overcame his original impulse, which was to regard the question as clearly inadmissible and sustain the defendant's objection. He thus reversed himself in deference to the supposed peremptory requirement of the decisions cited by the Government. The Court adhered to the same ruling in the cross-examination of three later character witnesses (129, 131, 138-9). One of these witnesses, David Oppenheim, testified, that he had had occasion to discuss with other people defendant's reputation for honesty, truthfulness and being a law-abiding citizen and that defendant's reputation in these respects was "very, very good, very honest" (129). The other two witnesses gave testimony identical in substance (131, 138). In each instance the cross-examination, proceeded as follows:

> "Q. Did you ever hear that on October 11, 1920, the defendant, Solomon Michelson, was arrested in New York City for receiving stolen goods? A. No" (129, 131, 138-139).

The mischievous effect of such testimony is stated without qualification by the leading text writer upon the law

of evidence as follows (*Wigmore, On Evidence,* Second and Third Editions, Sec. 988):

> "On this principle such inquiries are almost universally admitted, but the serious objection to them is that practically the above distinction—between the rumors of such conduct, as affecting reputation, and the fact of it as violating the ruling against particular facts—cannot be maintained in the mind of the jury. The rumor of the misconduct, when admitted, goes far, in spite of all theory and of the judge's charge, towards fixing the misconduct as a fact upon the other person, and thus does three improper things,—(1) it violates the fundamental rule of fairness (*ante,* Sec. 979) that prohibits the use of such facts, (2) it gets at them by hearsay only, and not by trustworthy testimony, and (3) it leaves the other person no means of defending himself by denial or explanation, such as he would otherwise have had if the rule had allowed that conduct to be made the subject of an issue. Moreover, these are not occurrences of possibility, but of daily practice. This method of inquiry or cross-examination is frequently resorted to by counsel for the very purpose of injuring by indirection a character which they are forbidden directly to attack in that way; they rely upon the mere putting of the question (not caring that it is answered negatively) to convey their covert insinuation. The value of the inquiry for testing purposes is often so small and the opportunities of its abuse by underhand ways are so great that the practice may amount to little more than a mere subterfuge, and should be strictly supervised by forbidding it to counsel who do not use it in good faith."

It will be shown presently that such questions, while frequently allowed, are always within the discretionary power of the Court to exclude, and that it is a reviewable abuse of discretion to permit them when it is obvious that their harmful tendency exceeds their value for the purpose of testing the standards of the witness.

Sloan v. *U. S.*, 31 F. (2d) 902;
Spalitto v. *U. S.*, 39 F. (2d) 782, 787.

Although the learned author notes that such questions are almost universally permitted he does not state, nor, it is submitted, do the authorities show, that all questions of this character must be admitted, nor that the Trial Court has no discretion with respect to their exclusion or admission. What the author says, and what the cases hold, is simply that the admission of such questions is not necessarily erroneous as a matter of law. Nowhere in the books, we believe, is it held that the Trial Judge may not exclude a question of this character when he believes that its mischievous effect outweighs any possible value that it may possess as "testing the standards of the witness".

In the case at bar the witnesses were not asked whether they had heard that the defendant had received stolen goods. They could not have been asked that question because the prosecutor would certainly not have been in a position to assure the Court that he had received them. They were asked only whether they had heard that the defendant had been arrested twenty-six years earlier on a charge of having received stolen goods.

There is perhaps no kind of merchandise which, when stolen, is more likely to be received by a dealer innocently

than second-hand jewelry. The question as to the making of such a charge a quarter of a century earlier (which had not prevailed) it was certainly one which the Trial Judge, in his discretion, could properly exclude. In this case the immediate reaction of the Trial Judge was to sustain the objection interposed by the defendant. He erred in supposing that he had no right to do so. Nothing in the authorities cited by the Government, and none that we have found, establish any such drastic obligation as that by which the Trial Judge considered himself bound. On the contrary, it has been held, in well-considered opinions, that the admission or exclusion of such questions is within the discretionary control of the Trial Judge.

Spalitto v. *U. S.*, 39 F. (2d) 782, 787.

In that case the Circuit Court of Appeals for the Eighth Circuit cited and quoted with approval an Oregon decision ascribing a flexible and discretionary character to the rule which the Trial Judge, in the case at bar, held to be rigidly and universally applicable.

Shortly after the decision in the *Spalitto* case above cited, the same Court reversed a conviction because questions of this very character had been permitted by the Trial Judge.

Pittman v. *U. S.*, 42 F. (2d) 793, 797.

In its unanimous reversing opinion, Circuit Court Judge Kenyon writing, the Court said (42 F. (2d) at 797):

> "While the limits of cross-examination must, of course, be guided by the discretion of the trial court,

> * * * (citing authorities) cross-examination should not be permitted to be used to covertly convey to the minds of jurors suspicion and prejudice as to a defendant by a recital as facts of supposed matters not appearing in the evidence and wholly outside of the case."

It is submitted that the supposed principle sanctioning the admission of such questions as were put to the character witnesses here, even if applied less rigidly than it was in this case, rests upon no sound basis, that questions of this character should be excluded in every instance and that the views expressed in Wigmore's comment present the basis from which the correct rule may and should be derived. That rule would simply exclude from cross examination of character witnesses as we exclude elsewhere any questions the substantial effect of which is to inform the jury that the defendant has been charged with the commission of crimes other than those for which he is being tried and having no connection with or relevance to the issues involved.

Such is the rule applied in Illinois for which the opinion in the case at bar expresses a strong and significant preference.

> *Aiken* v. *People*, 183 Ill. 215;
> *People* v. *Hannon*, 381 Ill. 206.

In the *Aiken* case, cited *supra*, the Court held that a witness who has testified in a criminal case that the general reputation of the accused as to being a peaceable and law-abiding man is good, *cannot* be asked, on cross-exami-

nation, whether he has heard rumors of the accused having been connected with former criminal acts. At page 222, the Court pointed out:

> "There is no ground for holding that the evidence, although inadmissible, did no harm. It must be remembered that the defendant was on trial for a serious crime, and it was his right to have the evidence confined to the charge in the indictment, and evidence which had a tendency to excite the passion or prejudice of the jury, as the evidence in question certainly did, and which had no legitimate bearing on the charge upon which the defendant was arraigned, could not do otherwise than lead to an erroneous verdict."

In *People* v. *Page*, 365 Ill. 524, cited at page 210 of *People* v. *Hannon*, cited *supra*, the prosecution was permitted to ask a character witness on cross examination in a criminal case if he ever heard of defendant being arrested. The Court held it to be reversible error even though the witness answered in the negative, as in the case at bar. The Court said:

> "The questions asked on cross examination had no justification. Their tendency was to prejudice the jury against the defendant. * * * Where such aspersions appear in the record the question is not what a court of review may think of the defendant's guilt or innocence but what the jury would have done if the case had been submitted to them without those aspersions."

The general rule laid down in the *People* v. *Hannon* case, cited *supra*, is stated at page 211, as follows:

> "Where the matters about which the inquiries are made have no connection with or relation to the offense charged, it is reversible error to ask such questions, even though objections thereto are sustained."

If this simple and salutary principle is preferable to the rule applied in this case, the circumstances at bar present an occasion appropriate for a decision to that effect. The controversy was real and the evidence was in serious conflict. Numerous details of the conceded circumstances surrounding the negotiations between the defendant and the Agent Kratter are reconcilable much more naturally and readily with the view that Kratter initiated the corrupt deal by demanding a payment of money from the defendant than with the Agent's narrative that the defendant, early in his contacts with the Agent, offered him money, insisted in taking him to the park for a discussion of the amount which he should pay, and that the other particulars ensued which are essential elements of the Agent's story. The good character of the defendant was of great importance, and the proof thereof might well enough have been decisive in his favor.

The Government included in its attack upon that character the disclosure of this unsubstantiated charge of a crime made, but not proved, twenty-six years before.

The defendant's version of the transactions between himself and the Agent Kratter, if true, would render him dispunishable for the corrupt deal prompted by the Government's own Agent, and would have entitled him to a verdict of not guilty. The Court correctly so charged

(152) *Sorrells* v. *U. S.*, 287 U. S. 435; *Lucadano* v. *U. S.* 280 Fed. 653, 2nd Cir.).

The defendant properly introduced cogent and abundant evidence of his good character. The prosecution was allowed to attack that evidence by insinuating that the defendant twenty-six years earlier had been arrested upon an accusation that he had received (with guilty knowledge) stolen goods. These questions could not possibly "test the standards of the witness", who had testified that the defendant's reputation was very good, but it could and did tend to suggest to the jury that the defendant was, and long had been, an unscrupulous and dishonest merchant. It is not necessary to argue that such insinuation was the purpose of the prosecuting attorney. It is enough that the working of this mischief was the only substantial result to be anticipated under the circumstances of this case from the Trial Judge's admission of these questions.

The artificiality of this whole line of inquiry is attested by the care which the trial Judge took to obtain the prosecutor's assurance that there was such an arrest as his questions implied (146-7) and his meticulous caution to the jury that, nevertheless, they must not assume any such arrest to have been made (154). The mere fact that the Court went to unusual lengths in cautioning the jury as to the relevancy and weight of such evidence indicates clearly the importance of the problem, not only to defendant but also to the Court (378-9, 389, 461-2). What effect has such persistent instructions upon the jury! If the rule necessitates such painstaking explanation is not the inevitable

effect to impress upon the jury the fact - not directly admissible in evidence - that the defendant has been arrested on one or more occasions. Is a prosecutor to be permitted to ask an unlimited number of questions regarding previous arrests? Or if the trial Judge, in his discretion limits the inquiries, upon what basis is the selection to be made? Is not a defendant who has had a previous arrest or arrests not indirectly deprived of his right to call character witnesses in his behalf?

The impropriety of asking the question as to the remote 1920 arrest is evidenced also by the fact that Mary E. Kirk, the first character witness to be asked that question, testified on direct that she had known the defendant only fifteen years, or since 1932 (p. 126). The damaging question was asked on cross-examination relating to an alleged arrest assumed to have occurred twelve years prior to her acquaintance with defendant.

The prosecutor made a further effort to create the impression that defendant committed another serious crime on cross-examination, and attempted to make it appear that defendant was a counterfeiter of trademarks (101). While the Court sustained the objection to the following question by the prosecutor, prejudice did result therefrom.

> "Q. When you made this application for a license in 1930, you did not put on there, did you, Mr. Michelson, that on March 24, 1927, you were convicted of counterfeiting trademarks on watches and that you were sentenced to pay either $200 or 30 days in jail. You did not put that down, did you?

Under the circumstances disclosed by the record it is apparent that the cross-examination of defendant's char-

acter witnesses by the Government was not for the purpose stated by the court (127) of "testing the standard of opinion" of the character witnesses.

We submit that the circumstances justify a reversal of the judgment affirming the conviction on the first count, by reason of the prejudice created against the defendant by the questions put to the character witnesses and to the defendant.

The only prior conviction testified to by defendant was the misdemeanor for possessing watch dials or watch faces, not genuine in 1927 (79-80). He further testified on direct that he had had no other trouble since he had been in the United States (80, fol. 240). The record fails to disclose on direct and cross-examination any evidence as to any arrest of defendant on a charge of receiving stolen goods, as insinuated by the prosecutor's questions (126, 129, 131), and, of course, no such evidence could properly have been introduced, as the trial court correctly charged (154).

The admission of the objectionable questions in this case not only deprived the defendant of his right to the probative force of the evidence of good character (*U. S.* v. *Antonelli Fire Works*, 155 F. (2d) 633; 639), but tended to persuade the jury to infer that he was a person of bad character. We submit that the questions by the prosecutor to the character witnesses in the case at bar, not a "strong" case as defined in *Berger* v. *U. S.*, 295 U. S. 78, 89, did tend to induce the verdict.

The destruction of defendant's character evidence through the questions asked, and permitted here, prevented

defendant from raising a reasonable doubt as to his guilt which might have resulted in his acquittal.

The Supreme Court, in *Edgington v. U. S.*, 164 U. S. 361, in referring to evidence of good character, stated that the circumstance may be such that a reputation for good character, if relevant to the issue, would *alone* create a reasonable doubt, although without it the other evidence would be convincing (p. 366):

> "* * * the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would *alone* create a reasonable doubt, although without it the other evidence would be convincing." (Emphasis mine.)

The disputed questions created undue prejudice upon issues which may well have been resolved in his favor had his objections been sustained and defendant allowed the benefit of such character evidence. The prejudice created here strongly indicates that the guilt of the defendant was not "found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts". (*Bollenbach v. U. S.*, 326 U. S. 607, 614).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for the writ should be granted as the fundamental questions involved in this application are of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a writ of certiorari.

Respectfully submitted.

February 16th, 1948.

Louis J. Castellano,
Attorney for Petitioner,
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Brooklyn 2, New York.

Appendix A—Statute Involved

Title 18, United States Code, Section 91, states in part:

> "Whoever shall promise, offer, or give, * * * any money or other thing of value, * * * to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, * * * with intent to influence his decision or action on any question, matter, cause or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or to omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the things so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised given, made or tendered, and imprisoned not more than three years."

Appendix B—Opinion

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 130—October Term, 1947.

(Argued January 8, 1948 Decided January 26, 1948.)

Docket No. 20818

UNITED STATES OF AMERICA,

Appellee,

v.

SOLOMON MICHELSON,

Defendant-Appellant.

Before:

SWAN, CHASE and FRANK,

Circuit Judges.

Appeal from a judgment of conviction, on two counts, entered by the United States District Court for the Eastern District of New York. Affirmed as to the First Count; Reversed as to the Second Count.

J. VINCENT KEOGH (Mario Pittoni, of counsel), *for appellee.*

LOUIS J. CASTELLANO (Brooklyn, N. Y.), *for appellant.*

Appendix B—Opinion

Defendant was indicted and tried in the Eastern District of New York for violation of 18 U. S. C. A. 91 which provides in part as follows: "Whoever shall promise, offer, or give, * * * any money or other thing of value, * * * to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, * * * with intent to influence his decision or action on any question, matter, cause or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made or tendered, and imprisoned not more than three years."

The first count of the indictment reads: "That on or about the 29th day of July, 1946, within the Eastern District of New York, the above named defendant, Solomon Michelson, did give a sum of money, to wit: Five Thousand Dollars ($5,000.00), to an officer and a person acting for and on behalf of the United States in an official function under the authority of the Treasury Department, to wit: Maurice M. Kratter, Internal Revenue Agent, with intent to influence his decision and action on a question and matter then pending before him in his official capacity, with intent

to influence said Internal Revenue Agent to collude in and allow a fraud on the United States and to induce him to do an act in violation of his lawful duty in respect to the defendant's income tax return. (Title 18, United States Code, Section 91.)" The second count is identical with the first, except that the words "to offer" are substituted for the word "give." The jury found defendant guilty on both counts. The judge sentenced him to imprisonment for eighteen months on the first, and to imprisonment for eighteen months and a fine of $2,500 on the second, the prison sentences to run concurrently.

FRANK, *Circuit Judge*:

The Second Count

We think that Congress, as it lawfully may, provided that to "offer" a bribe and to "give" a bribe are two distinct crimes even when parts of a single transaction, since the one (to "give") involves an element which the other (to "offer") does not.[1] The test, as stated in *Morgan* v. *Devine*, 237 U. S. 632, 640, is whether "separate acts have been committed with the requiste criminal intent." The present case does not meet that test. Kratter, the principal government witness, testified as follows: On July 17, 1946, in New York City,[2] defendant offered him

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[1] *Blockburger* v. *United States*, 284 U. S. 299, 303-304; *Albrecht* v. *United States*, 273 U. S. 1, 11; *Burton* v. *United States*, 202 U. S. 344, 377; *Morgan* v. *Devine*, 237 U. S. 632, 640; *Gavieres* v. *United States*, 220 U. S. 338, 342; *Lindsay* v. *United States*, 134 F. (2d) 960, 961 (C. C. A. 10); *cf. American Tobacco Co.* v. *United States*, 328 U. S. 781, 787-788.

[2] New York City is in the Southern District of New York.

a bribe of $5,000, and he told defendant he would take it.[3] Defendant then said that, when he had the money, he would telephone Kratter. On July 26, defendant, on the telephone, told Kratter that he had the money and wanted to meet Kratter to give it to him. On July 29, Kratter by phone, arranged with defendant for a meeting at a room in the St. George Hotel in Brooklyn.[4] Kratter went to that room. His own words, as to what then occurred, follow: "A few minutes later there was a knock on the door. I opened the door and Mr. Michelson came in, and I closed the door after him. He dropped a package on a dresser or chifferobe, something like that that was in the hotel room, and he sat down and I sat down. I asked him if he had the

[3] Kratter's testimony as to that conversation is as follows:

"Q. Did you and Mr. Michelson have a conversation while you were walking along together? A. Yes, a conversation ensued during the walk. Mr. Michelson kept insisting that I do something to straighten out his tax return and fix things up for him so he wouldn't get into too much trouble. He offered me $3,000 while we were walking toward the subway, and then he said, 'Make it $5,000.' I told him I wouldn't touch that kind of money, I wasn't interested in it, I didn't want to get mixed up in that situation. Then he kept insisting. We had walked about two or three blocks from his office, and I finally stopped in the street and kept talking to him. He refused to leave me, and insisted that we come to some sort of agreement regarding his tax situation. I finally told him—he said, 'Will you take $5,000?' And he told me he would pay another $5,000 to the Government. I finally said 'O. K.,' in order to get away from him, and he told me he would call me up when he had the money, and he asked me for my business card and home telephone. I gave him one of my cards and wrote down the phone number while we were standing on the street, and then we parted."

[4] Brooklyn is in the Eastern District of New York.

money, and he said, 'Yes, it is in the bag over there.' I took the bag, unwrapped it, and he took out a large number of five, ten and twenty-dollar bills, and he said, Mr. Michelson said, 'There is $5,000 there.' I made a quick count of the bills and satisfied myself that there was approximately $5,000 in the package * * * " Defendant's conduct at that Meeting in Brooklyn constituted his performance of the agreement of July 17—an illegal bargain resulting from a previously accepted offer—to give the $5,000 bribe.' He did not on that day or at any other time in the Eastern District both offer and give. He merely gave.[5]

The offer of July 17 cannot sustain the conviction on count 2. For defendant made that offer in New York City in the Southern District, and the defendant was indicted and tried in the Eastern District. Had that offer been specified in the indictment, defendant, thus warned of the improper venue, would have waived the lack of proper venue by going to trial without interposing an objection.[6] The same might have been true if, during the trial, defendant had in some manner been put on notice that the government intended to rely on that New York City offer as a crime, for which he was being tried. But here there

[5] Kratter testified that after he had thus received the money, "I asked Mr. Michelson what he wanted me to do for the money, and he told me he wanted me to turn in a report which would indicate that he owed about $1,200 on his 1943 tax return and about $900 on his 1942 return. He said that was all he wanted me to do. Then I told him, 'You understand the only reason I am doing this is because you insist upon it, isn't that so?' And he said, 'Yes, that is right.' "

This conversation did not show a new offer but merely arrangements for carrying out the details of the previous agreement.

[6] *United States* v. *Jones*, 102 F. (2d) 72 (C. C. A. 2).

was nothing so to notify him. Indeed, the trial judge, in his charge, told the jury that the issue was whether defendant gave or offered to give, or both, $5,000 to Kratter on July 29 at the Hotel St. George. We therefore conclude that we must reverse as to the second count.

Alleged Errors as to the First Count

1. The defendant called three character witnesses who testified that he had an excellent reputation for "honesty, truthfulness and being a law-abiding citizen." On cross-examination, they were asked whether they had heard (a) that in 1927 he had been convicted in a New York court and sentenced to pay a fine of $100 or 30 days in jail, and (b) that in 1920 he had been arrested for receiving stolen goods.

The judge, out of the jury's presence, received the assurance of the government's counsel that defendant had been thus arrested in 1920. The defendant, on the witness-stand, had previously admitted the conviction in 1927. The judge, when these witnesses were being questioned, said: "However, I instruct the jury that what is happening now is this: the defendant has called character witnesses, and the basis for the evidence given by those character witnesses is the reputation of the defendant in the community, and since the defendant tenders the issue of his reputation the prosecution may ask the witness if she has heard of various incidents in his career. I say to you that regardless of her answer you are not to assume that the incidents asked about actually took place. All that is happening is that this witness' standard of opinion of the reputation

of the defendant is being tested. Is that clear?" In his charge to the jury, the judge said: "In connection with the character evidence in the case I permitted a question whether or not the witness knew that in 1920 this defendant had been arrested for receiving stolen goods. I tried to give you the instruction then that that question was permitted only to test the standards of character evidence that these character witnesses seemed to have. There isn't any proof in the case that could be produced before you legally within the rules of evidence that this defendant was arrested in 1920 for receiving stolen goods, and that fact you are not to hold against him; nor are you to assume what the consequences of that arrest were. You just drive it from your mind so far as he is concerned, and take it into consideraton only in weighing the evidence of the character witnesses." The questions were of the kind often held proper in examining "character witnesses."[7] That being the rule, we see no abuse of discretion in permitting them to be asked here.[8] Defendant asserts error in putting

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[7] See, *e.g.*, *Mannix* v. *United States*, 140 F. (2d) 250, 252 (C. C. A. 4); *Josey* v. *United States*, 135 F. (2d) 809, 811 (App. D. C.); *Spalitto* v. *United States*, 39 F. (2d) 782, 785-787 (C. C. A. 8); *cf. Stewart* v. *United States*, 104 F. (2d) 234, 235 (App. D. C.).

[8] Wigmore, *Evidence* (3d ed. 1940) §988, after noting that "such inquiries are almost universally admitted," not as "impeachment by extrinsic testimony of particular acts of misconduct," but as means of testing the character "witness' grounds of knowledge," continues with these comments: "But the serious objection to them is that practically the above distinction between rumors of such conduct, as affecting reputation, and the fact of it as violating the rule against particular facts—cannot be maintained in the mind of the jury. The rumor of the misconduct, when admitted, goes far, in spite of all theory and of the judge's charge, towards fixing the misconduct

the question about the 1920 arrest to a witness who had known defendant only since 1932. We cannot agree; for she might have heard rumors of an arrest which happened before she knew him.

3. On direct examination by his own counsel, defendant testified to his conviction in 1927 on a charge of possessing counterfeit watch-dials, but that he had no other trouble since he had been in the United States. On cross-examination, defendant testified that, in 1930, in an application signed by him for a license for vending second-hand jewelry, he had never been arrested for any offense. Thereupon he was asked whether he had stated in this application that

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as a fact upon the other person, and thus does three improper things,—(1) it violates the fundamental rule of fairness that prohibits the use of such facts, (2) it gets at them by hearsay only, and not by trustworthy testimony, and (3) it leaves the other person no means of defending himself by denial or explanation, such as he would otherwise have had if the rule had allowed that conduct to be made the subject of an issue. Moreover, these are not occurrences of possibility, but of daily practice. This method of inquiry or cross-examination is frequently resorted to by counsel for the very purpose of injuring by indirection a character which they are forbidden directly to attack in that way; they rely upon the mere putting of the question (not caring that it is answered negatively) to convey their covert insinuation. The value of the inquiry for testing purposes is often so small and the opportunities of its abuse by underhand ways are so great that the practice may amount to little more than a mere subterfuge, and should be strictly supervised by forbidding it to counsel who do not use it in good faith."

Because, as Wigmore says, the jury almost surely cannot comprehend the judge's limiting instruction, the writer of this opinion wishes that the United States Supreme Court would tell us to follow what appears to be the Illinois rule, viz., that such questions are improper unless they relate to offenses similar to those for which the defendant is on trial. See *Aikin v. People*, 183 Ill. 215, 55 N. E. 695; cf. *People v. Hannon*, 381 Ill. 200, 44 N. E. (2d) 923.

he had been convicted of 'counterfeiting trade-marks on watches." His counsel objected on the ground that the conviction had been for "possession of counterfeit." The court said, "Sustained on that ground." Government counsel then asked, "You did not say in that paper that you had been arrested and that you were convicted of that charge?" No objection was made. We find no prejudicial error.

4. Defendant complains that the judge in his charge unfairly interpreted the testimony of a witness, Osterfeld, in a manner prejudicial to defendant. We think the interpretation not unfair. But, even assuming the contrary, there is no reversible error. In the first place, defendant did not object to this part of the charge.[9] In the second place, the judge made it plain that, despite his comments on the evidence, the jury were to rely on their own recollection of the evidence.

AFFIRMED AS TO THE FIRST COUNT; REVERSED AS TO THE SECOND.

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[9] See *United States* v. *Marino*, 141 F. (2d) 771 (C. C. A. 2). Nor did he object to a question the judge put to that witness, a question, moreover, which we think entirely proper.

LIBRARY
SUPREME COURT, U S

Supreme Court of the United States

October Term, 1948

No. 23

23

SOLOMON MICHELSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER

Louis J. Castellano,
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Brooklyn (2), New York.

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Supreme Court of the United States

October Term, 1948

No. 23

SOLOMON MICHELSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER

Opinions Below

No opinion was rendered by the District Court. The opinion of the Circuit Court is reported in 165 F. 2d 732. A copy of the opinion is annexed hereto as Appendix A.

Jurisdiction

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, U. S. C. A., Title 28, Section 347 (a).

Statement of the Case

By an indictment (2-3),[1] containing two counts, filed on September 3, 1946 in the office of the Clerk of the United States District Court for the Eastern District of New York, the petitioner herein, Solomon Michelson, was charged in the first count, in substance, with giving a sum of money, to wit, Five Thousand Dollars ($5,000), to Maurice M. Kratter, Internal Revenue Agent, on or about July 29th, 1946, as a bribe, with intent to influence said agent's action in a matter pending before him in his official capacity; and in the second count with offering a like sum to the same agent with like intent on the same day.

Petitioner pleaded not guilty to the said indictment and a trial of the issues thus presented was had on December 9th and 10th, 1946, before Honorable Robert A. Inch, District Judge, and a jury. The trial resulted in a disagreement by the jury and a mistrial. A second trial was had before Honorable Harold M. Kennedy, District Judge, and a jury. A verdict of guilty on both counts was returned by the jury. The District Court, on January 16, 1947, imposed sentence of 18 months imprisonment upon petitioner on each count, the sentences to run concurrently, and further imposed a fine of $1:00 on count one and a fine of $2,500 on count two. On the same day judgment of conviction accordingly was filed in the Office of the Clerk of the said District Court (3-4).

Petitioner duly appealed from the said sentence and judgment of conviction to the United States Circuit Court of Appeals for the Second Circuit. That Court, after hearing, rendered its decision on January 26, 1948, affirming said judgment of conviction on the first count for giving

[1] The indictment was drawn under United States Code, Title 18, Section 91. The text of the statute is annexed hereto as Appendix B.

the bribe, and reversing the said judgment of conviction on the second count for offering the bribe, holding that the separate crime charged in the second count had not been proved since, upon the evidence, defendant was guilty only of the offense charged in the first count (161-162).

The petition for certiorari was granted by this Court on the 5th day of April, 1948.

Petitioner was a licensed retail dealer in second-hand jewelry, whose place of business was located in a store at 74 Bowery, in the borough of Manhattan, New York City (69). Various other jewelry dealers also had space in that store for the conduct of their business (26, 71). The physical layout of these premises is described at pages 26 and 27 of the record on appeal.

The Internal Revenue agent, Kratter, had been assigned to audit petitioner's books. During the week of July 15, 1946, he visited petitioner's place of business for the purpose of determining whether petitioner's income tax returns for the year 1942 and 1943 were correct (6-7, 26-28).

A payment of $5,000 by petitioner to Kratter was not disputed at the trial. The principal and virtually the only issue presented was whether that payment was initiated by suggestions and threats on the part of Kratter or by proposals emanating in the first instance from petitioner. If, of course, it were established that the illicit arrangement originated in the mind of Kratter and was suggested by him to petitioner, then, under the doctrine of entrapment, petitioner could not be punished for the offense charged in the indictment (*Sorrells v. United States*, 287 U. S. 435).

Both Kratter and petitioner agreed on certain essential details of the transaction between them. Both men agreed that they went to lunch together and, after lunch, instead of returning at once to the store to complete the examination of the books, they sat together in the park for about forty-five minutes. There they discussed the size of the

amount which petitioner was to pay Kratter (12, 28-31, 75-78). Kratter admitted that he gave his approval to an arrangement to pay him money while in the park, when he testified (12):

> "Well, when Mr. Michelson kept insisting and refused to return to the store, I finally told him O.K. when he said he wanted to give me $1000 to straighten up his tax. Then immediately thereafter he said, "Make it $800" and I said, "O.K.", in order to get back to the store."

and he further testified (31):

> "Q. Now, you did consent to take $1000 at one period, did you? A. That is right."

After this discussion, they returned to the store. When Kratter had finished his examination for the day and was leaving to go home, the sum of $5000 was agreed upon (15, 33, 34), and Kratter gave petitioner his card on which he wrote his home telephone number (Government Exhibit 1, pp. 15, 34-35).

Kratter's testimony on this matter is as follows (34):

> "Q. After you left the premises on July 17 after 4 P. M. you say the defendant followed you out to the street? A. That is right."
>
> "Q. Talking to you? A. Yes."
>
> "Q. Was something said about $5,000 on the street? A. He asked me if I would take $5,000."
>
> • • •
>
> "Q. You say the figure reached $5,000? A. That is right."
>
> • • •
>
> "Q. You did say at some point on the street as you were walking with him you would accept $5,000? A. That was the end of the conversation."
>
> "Q. Did you say that or not? A. I did."

Michelson testified (79):

"He wrote down Gramercy 3-4372, and he gave me that card."

"He (Kratter) told me, This is my home telephone number. When you have the money ready, just call me up and let me know."

Kratter attributed this arrangement to what he said was petitioner's insistence on reaching an understanding (14-15). On the other hand, petitioner testified that it was because Kratter was pressing his demand for a payment (78).

Kratter finally reported the incident to his superiors and, under their direction, laid a trap which resulted in petitioner's arrest on a bribery charge (58-61).

The testimony is in sharp contradiction as to the date of the visit by Kratter during which the payment was discussed. Kratter asserted that the date was Wednesday, the 17th of July, 1946 (8). Petitioner testified that it was Monday, July 15th, the first day upon which he returned to the office after a vacation absence (71, 85-86).

Petitioner's testimony in this regard is strongly corroborated by that of the witness, Gerstein. He was another jewelry dealer who had his desk and stock of merchandise in the store at 74 Bowery and only a few feet from the petitioner. According to Gerstein's testimony, all of the merchants in business at that address took their vacations at the same time and the entire store was closed in the interval; all of them returned to business on July 15, 1946, and on that day Kratter called at the premises, was engaged in conversation with petitioner there, went out to lunch with the latter and returned with him later in the afternoon (105-106, 107-111).

This dispute respecting the date of the bargain between Kratter and petitioner is vitally important, because of its bearing upon the main issue as to which of the two first suggested the illicit arrangement.

Kratter admittedly did not tell any of his associates about his transactions or talks with petitioner until the afternoon of Thursday, July 18th, when he spoke "with one of the older agents" (17), and did not inform his superior, Agent Yung, about the matter until the next day, Friday, July 19th (17, 36, 62).

Those dates Kratter could not change and, if his arrangement with petitioner was made on Monday, July 15th, it was obviously difficult for him to explain, consistently with his own innocence, why he gave petitioner his home telephone number and thereafter waited four days before reporting the matter to his superior. That delay would accord far more naturally with petitioner's version that Kratter himself initiated the negotiations and brought it to the attention of Agent Yung only after deciding to abandon the idea following his talk on the afternoon of Thursday, the 18th, with his older associate, Rubinstein, who was not called as a witness.

Further testimony corroborating petitioner as to the date was given by the accountant, Abraham Osterfeld. Osterfeld testified that on Monday, July 15, 1946, he received a telephone call from Michelson's place of business and that the person with whom he talked gave his name as "Krapness or Kratter" (118), that this individual asked him whether he could see the petitioner's books, and also asked for the petitioner's 1942 return (118). Osterfeld further testified that on that same day when he was eating lunch at a cafeteria, he saw petitioner there with Kratter (119-121).

In addition, this witness also gave testimony corroborating petitioner as to another very important fact, viz., that after Kratter's visit to petitioner's place of business and on that same day, Kratter made a demand upon petitioner for a payment of money. As to this incident, Osterfeld testified that, on the evening of that day, petitioner informed him that Kratter had asked him for $5,000 (119, 122).

In that state of the record, petitioner produced witnesses to testify to his high repute for "honesty, truthfulness and as a law abiding citizen." The consensus of this testimony was that petitioner's reputation in these respects was "very very good, very honest" (115).

The first of these character witnesses was Mary E. Kirk who had known the petitioner for about fifteen years (112), or since 1932. On cross examination the prosecuting attorney asked this witness if she had ever heard that petitioner, on October 11, 1920, had been arrested for receiving stolen goods (112). Counsel for petitioner promptly objected and moved for the withdrawal of a juror. The Trial Court, at first, sustained the objection. The prosecuting attorney, however, handed the Court a memorandum on the matter. Thereupon the Court immediately reversed itself and permitted the question (113) and instructed the jury:

> "I say to you that regardless of her (the witness') answers, you are not to assume that the incidents asked about actually took place."

The question put to Miss Kirk, viz. whether she had ever heard of petitioner's alleged arrest in 1920, was repeated, over objection and exception, to three other character witnesses produced by petitioner (Oppenheim, 115; Weitzman, 117; Smith, 124). Each witness replied that he had heard no such rumor. Then on cross examination of the last witness, Smith, the Trial Court, in the presence of the jury, asked him (124):

> "Would it have made any difference if you had known that latter (i.e., the report of the 1920 arrest)?"

The witness replied:

> "I don't think so."

Assignment of Errors and Summary of Argument

1. The Trial Court committed reversible error in permitting the prosecuting attorney, over repeated objections, to cross examine petitioner's character witnesses as to an old and unrelated criminal arrest.

2. The errors in question require that petitioner be granted a new trial.

POINT I

The Trial Court committed reversible error in permitting the prosecuting attorney, over repeated objections, to cross examine petitioner's character witnesses as to an old and unrelated criminal arrest.

At the outset, counsel for petitioner frankly acknowledges that cross examination of character witnesses as to reports or rumors of prior acts of misconduct on the part of a defendant is permitted in many jurisdictions. The basis for permitting such cross examination is that it simply tests the grounds of the witnesses' knowledge of defendant's reputation (see the cases collected in 3 Wigmore on Evidence, Third Edition, Sec. 988).

Although the whole question seems to be an open one in this Court, we are concerned solely, on this record, with the propriety of such cross examination with regard to an arrest which did not result in a conviction.

Counsel for petitioner respectfully submits that a federal prosecuting officer should not be permitted to cross examine a character witness as to rumored prior arrests of a defendant whether or not such arrests relate to offenses similar to that for which the defendant is on trial.

In opposing the petition for certiorari herein, the Government, in its brief, misstates that position (p. 8). The position of counsel for petitioner has consistently been, as stated at page 6 of the petition for certiorari, that the rule permitting inquiry as to rumors of a defendant's previous arrests, "because of its objectionable features and mischievous results, should be authoritatively disapproved."

Professor Wigmore says that the serious objection to the rule is that the report of an act of misconduct, when presented to the jury, goes far to fix the misconduct as a *fact* upon the defendant. Thus, says the author, the rule violates the fundamental canon of fairness prohibiting the use of such facts, gets at them by hearsay only instead of by trustworthy evidence, and leaves the other person no means of defending himself by denial or explanation (Wigmore, op. cit., 988).

All those objectionable features of this type of cross-examination are aggravated when the report or rumor involved is that of a mere arrest of a defendant. As this same learned author says (Wigmore, op. cit., Section 980), the mere fact of having been arrested does not in itself indicate a defect in character. A contrary notion, so the author says, seems to have prevailed in English courts in the early 1800's but is certainly not judicially entertained in this country where an arrest is regarded by the courts as a mere accusation of crime. A different view, however, may well be taken by jurors who, while inclined perhaps to discount rumors of acts of violence or immorality, will no doubt give such rumors greater credence as being true in fact if the alleged acts of misconduct have reportedly resulted in arrests.

That the rule in question is difficult to apply and always works unfair prejudice to a defendant is abundantly illustrated by the present case.

The Trial Court, as previously mentioned, refused at first to permit inquiry as to petitioner's alleged previous arrest. Immediately thereafter, as counsel for petitioner reads the record, the Court, in deference to what it supposed was the peremptory requirement of the precedents cited by the prosecuting attorney, reversed its ruling and permitted the inquiry (112-113). But, of course, as even the cases cited by the Government show, the question asked was certainly one which the Trial Court, in its discretion, could properly have excluded. The Court was in error in supposing that it had no right to do so. Rather the Court seems to have supposed that it was bound, on the authorities cited, to admit the evidence. None of the authorities support that view but, on the contrary, hold that allowance or refusal of such an inquiry is a matter resting in the sound discretion of the trial judge (see *Spalitto* v. *United States*, 39 F. 2d 782, 787).

The Court's misapplication of the principle involved was again brought out at a subsequent point in the record. On cross examination of the last character witness, Smith, the Trial Court asked him in the presence of the jury (124):

> "Would it have made any difference if you had known that latter (referring to the report of the 1920 arrest)?"

The witness replied, "I don't think so."

Thus the Trial Court took the position that the relevant inquiry was what the character witnesses thought about petitioner's reputation. But, as all the authorities hold, such is not a permissible object of this type of questioning (*Sloan* v. *United States*, 31 F. 2d 902, 906; 3 Wigmore on Evidence, Third Edition, p. 618).

Although the Trial Court was not itself able to keep the refinements of the rule distinctly in mind, it attempted to impress those refinements upon the minds of the jurors by means of repeated instructions (113, 116, 137). The

artificiality of this whole line of inquiry is attested by the care which the Trial Court took to obtain the prosecutor's assurance that there had been such an arrest as the questions implied (130-131) and his meticulous caution to the jury, that they must not assume any such arrest to have been made (137).

Thus the Court instructed the jury (113):

> "I say to you that regardless of her (the witness') answers, you are not to assume that the incidents asked about actually took place."

Similar instructions were given later (116):

> "Again I say to the jury there is no proof that Mr. Michelson was arrested for receiving stolen goods in 1920, there isn't any such proof. All this witness has been asked is whether he had heard of that. There is nothing before you on that issue."

And in its charge to the jury (137) the Court stated:

> "* * * there isn't any proof in the case that could be produced before you legally within the rules of evidence that this defendant was arrested in 1920 for receiving stolen goods and that fact you are not to hold against him:"

The mere fact that the Court went to unusual lengths in cautioning the jury as to the relevancy and weight of such evidence indicates clearly the importance of the problem, not only to the defendant but also to the Court. What effect has such a question to a character witness by a federal prosecutor? He is a public officer owing a duty to the Government and to the defendant as well. His statements and questions in a court room are generally accepted by jurors as correct and proper. When we add the persistent instructions to the jury, we reach the con

clusion that both the question and the instructions serve to impress upon the jury the fact,—not directly admissible in evidence,—that the defendant has been arrested on one or more occasions and is an habitual criminal. Is a prosecutor to be permitted to ask an unlimited number of questions regarding previous arrests? Or, if the trial judge, in his discretion limits the inquiries, upon what basis is the selection to be made? Is not a defendant who has had a previous arrest or arrests not indirectly deprived of his right to call character witnesses in his behalf?

Furthermore, the rule was so applied in this case as seriously to prejudice the petitioner. The court, to be sure, prior to the conclusion of the trial, required the prosecutor's assurance that the arrest had been made. The prosecutor gave such assurance, but the defendant could not challenge the assertion. It was, at best, a reckless assurance. The prosecutor undoubtedly had an abstract from a police record furnished to him by his investigator. In these circumstances we have placed before the jury a suggestion that this defendant had been arrested for receiving stolen goods when the prosecutor can only be sure that he had been arrested. In other words, twenty-seven years before the trial, an unidentified police officer apprehended a man. The arresting officer made a record of the arrest and a statement that the arrest was for receiving stolen goods. How can the prosecutor be sure that the arresting officer correctly evaluated the facts and properly determined that those facts would constitute the crime of receiving stolen goods. Subjected to analysis, the facts surrounding the arrest might warrant a much less invidious charge than receiving stolen goods. We know that the defendant was not convicted of such a charge for, if he had been, the prosecutor would have confronted him with the record of conviction. In this way, a presumably innocent man was prejudiced twenty-seven years later by a suggestion made, at a critical turn in his affairs, that he

had been arrested for receiving stolen goods, and he had no opportunity to explore this collateral issue either to show that the arrest was unjustified or that the circumstances prompting the arrest did not by any means constitute receiving stolen goods.

The Trial Court was well aware of the telling blow that this question had inflicted upon petitioner, as witness its labored instructions to the jury in an attempt to remedy the damage that had obviously been inflicted upon petitioner by a line of inquiry that its first sure instinct had told it was prejudicial.

Moreover, it has been repeatedly held that character witnesses may not be cross examined as to rumors of alleged acts of misconduct which are *remote* in time (*Sloan v. United States*, 31 F. 2d 902, 906; *State v. Bell*, 206 Iowa 816, 221 N. W. 521; *People v. Willis*, 301 Ill. 307, 133 N. E. 859; *Barnett v. State*, 34 Ariz. 129, 268 P. 611). That rule was here disregarded and especially in the case of the witness Kirk, who had known petitioner only since 1932. Yet the prosecutor was permitted to question her with regard to an incident alleged to have occurred twelve years prior to her acquaintance with petitioner and twenty-six years prior to the trial. We respectfully submit, that that was serious error since the courts have long recognized that cross examination of character witnesses as to rumored acts of misconduct by a defendant is a dangerous practice and must not, in the interest of good faith and fairness, be extended beyond its true limits (*People v. Elliott*, 163 N. Y. 11; *Evans v. Commonwealth*, 211 Ky. 709, 277 S. W. 1029).

Further, the remoteness of the rumor of an arrest in 1926 from any of the issues of the trial is important in determining the good faith of the prosecuting attorney. On the question of good faith the authorities are very exacting. Thus Wigmore says (3 Wigmore on Evidence, Third Edition, p. 624):

> "The value of the inquiry for testing purposes is often so small and the opportunities of its abuses in underhand ways are so great that the practice may amount to little more than a mere subterfuge and should be strictly supervised by forbidding it to counsel who do not use it in good faith."

In other words, if the prosecuting attorney's real purpose is not so much to impeach a character witness as it is to get before the jury by subterfuge matters prejudicial to defendant and not directly admissible, such matter should be withheld from the jury (*Pittman* v. *United States*, 42 F. 2d 793, 797; *People* v. *Marendi*, 243 N. Y. 600, 617, 618; *State* v. *Barnes*, 194 Iowa 628, 190 N. W. 38).

The New York law does not permit the fact of a previous arrest to be alluded to on cross examination of a defendant. (*People* v. *Cascone*, 185 N. Y. 317; *People* v. *Crapo*, 76 N. Y. 288; *Kemp* v. *United States*, 151 F. 2d 680, 687, 688; *United States* v. *Modern Roofing & Battat Co.*, 159 F. 2d 656, 658.) Therefore, one result, and a very important one from the standpoint of the prosecution, was to get before the jury an alleged arrest of petitioner that could not have been proved directly.

This line of inquiry left the petitioner helpless to refute the charge, if untrue, or to explain that it ultimately proved to be unfounded, if that were the fact. We respectfully submit that, when a prosecutor poses such question, he oversteps the bounds of propriety and fairness.

In *Berger* v. *United States*, 295 U. S. 78, this Court at page 88 said:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution

is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The questions posed by the prosecutor in this case simply tended to persuade the jury to believe that petitioner was a person of bad character and an habitual criminal. Certainly the only reason for asking those questions was to create bias and prejudice in the minds of the jurors.

As already noted, the alleged fact of the petitioner's arrest more than 26 years before the trial was placed before the jurors not once or twice but repeatedly both by the prosecutor's cross examination of the four character witnesses, and by the trial judge's comments and his charge to the jury.

The wisdom of stringently limiting this type of cross examination has been recognized by the Illinois courts. (*Aiken* v. *People*, 183 Ill. 215; *People* v. *Page*, 365 Ill. 524; *People* v. *Hannon*, 381 Ill. 206.)

In the *Aiken* case, cited *supra*, the Court held that "a witness who has testified in a criminal case that the general reputation of the accused as to being a peaceable and law-abiding man is good, cannot be asked, on cross examination, whether he has heard rumors of the accused having been connected with former criminal acts." At page 222, the Court pointed out:

"There is no ground for holding that the evidence, although inadmissible, did no harm. It must be remembered that the defendant was on trial for a

serious crime, and it was his right to have the evidence confined to the charge in the indictment, and evidence which had a tendency to excite the passion or prejudice of the jury, as the evidence in question certainly did, and which had no legitimate bearing on the charge upon which the defendant was arraigned, could not do otherwise than lead to an erroneous verdict."

In *People* v. *Page*, 365 Ill. 524, the prosecutor was permitted to ask a character witness on cross examination in a criminal case if he ever heard of defendant's being arrested. The Court held it to be reversible error even though the witness answered in the negative, as in the case at bar. The Court said (p. 528):

> "The questions asked on cross examination had no justification. Their tendency was to prejudice the jury against the defendant. * * * Where such aspersions appear in the record the question is not what a court of review may think of the defendant's guilt or innocence but what the jury would have done if the case had been submitted to them without those aspersions."

The general rule laid down in the *People* v. *Hannon* case, cited *supra*, is stated at page 211, as follows:

> "Where the matters about which the inquiries are made have no connection with or relation to the offense charged, it is reversible error to ask such questions, even though objections thereto are sustained."

It was the suggestion of Judge Frank, who wrote the opinion in the Court below, that this Court should tell the lower federal courts to follow this so-called "Illinois Rule" (161). In the final paragraph of the foot note he stated:

> "Because, as Wigmore says, the jury almost surely cannot comprehend the judge's limiting instruction,

> the writer of this opinion wishes that the United States Supreme Court would tell us to follow what appears to be the Illinois rule, i. e., that such questions are improper unless they relate to offenses similar to those for which the defendant is on trial."

That suggestion, if adopted, would undoubtedly restrict the kinds of possibly unfounded accusations that could be aimed at the character of a defendant. But it is the position of counsel for petitioner, and he respectfully urges it upon this Court, that the sounder rule would altogether forbid a prosecutor to make such use of any prior criminal charges that did not result in conviction. Then a defendant, whose character had in truth never been shown to be otherwise than good, might show that fact to the jury without running the risk of having it besmirched by charges which had never been proved to be based on fact.

POINT II

The errors in question require that petitioner be granted a new trial.

It is well established that, even in a criminal case where the defendant's guilt is almost conclusively proved, evidence of his good character is of the utmost importance. This Court, in *Edgington* v. *U. S.*, 164 U. S. 361, in referring to evidence of good character, stated that the circumstances may be such that a reputation for good character, if relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing (p. 366):

> "* * * the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt.

> The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing." (Emphasis mine.)

Now, as previously pointed out, the principal issue in this case was a close one (*cf. Berger* v. *United States*, 295 U. S. 78, 89). That issue, simply stated, was whether Kratter or petitioner was telling the truth as to which one of them initiated the alleged bribe transaction. The scales were not, we submit, evenly balanced between petitioner and his accuser because certain glaring improbabilities, already referred to, weighed against Kratter's testimony. Those circumstances—taking them most favorably to Kratter—showed that he first made an arrangement with petitioner whereby the latter was to pay him $5,000 and thereafter, while petitioner was trying to raise the money, changed his mind, reported the matter to his superiors and worked with them to lay a trap which has resulted in petitioner's being the only party held to answer for the alleged illicit bargain between them.

In that view, this is not a "strong" case for the prosecution and, therefore, the errors complained of require that petitioner be granted a new trial. The admission of the objectionable questions not only deprived petitioner of the probative force of the evidence of his good character but also placed before the jury facts, not otherwise admissible in evidence, which tended to create in the minds of the jurors the impression that petitioner was an habitual law offender, and deprived him of his right to a fair trial. The undue prejudice to petitioner, thereby created, strongly indicates that his guilt was not "found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts" (*Bollenbach* v. *United States*, 326 U. S. 607, 614).

CONCLUSION

The judgment of conviction should be reversed and a new trial granted under the first count of the indictment.

Respectfully submitted,

LOUIS J. CASTELLANO,
Attorney for Petitioner.

LOUIS J. CASTELLANO,
DANIEL MCNAMARA,
of Counsel.

Appendix A—Opinion

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 130—October Term, 1947.

(Argued January 8, 1948 Decided January 26, 1948.)

Docket No. 20818

UNITED STATES OF AMERICA,

Appellee,

v.

SOLOMON MICHELSON,

Defendant-Appellant.

Before:

SWAN, CHASE and FRANK,

Circuit Judges.

Appeal from a judgment of conviction, on two counts, entered by the United States District Court for the Eastern District of New York. Affirmed as to the First Count; Reversed as to the Second Count.

J. VINCENT KEOGH (Mario Pittoni, of counsel), *for appellee.*

LOUIS J. CASTELLANO (Brooklyn, N. Y.), *for appellant.*

Appendix A—Opinion

Defendant was indicted and tried in the Eastern District of New York for violation of 18 U. S. C. A. §91 which provides in part as follows: "Whoever shall promise, offer, or give, * * * any money or other thing of value, * * * to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, * * * with intent to influence his decision or action on any question, matter, cause or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made or tendered, and imprisoned not more than three years."

The first count of the indictment reads: "That on or about the 29th day of July, 1946, within the Eastern District of New York, the above named defendant, Solomon Michelson, did give a sum of money, to wit: Five Thousand Dollars ($5,000.00), to an officer and a person acting for and on behalf of the United States in an official function under the authority of the Treasury Department, to wit: Maurice M. Kratter, Internal Revenue Agent, with intent to influence his decision and action on a question and matter then pending before him in his official capacity, with intent to influence said Internal Revenue Agent to collude

in and allow a fraud on the United States and to induce him to do an act in violation of his lawful duty in respect to the defendant's income tax return. (Title 18, United States Code, Section 91.)" The second count is identical with the first, except that the words "to offer" are substituted for the word "give." The jury found defendant guilty on both counts. The judge sentenced him to imprisonment for eighteen months on the first, and to imprisonment for eighteen months and a fine of $2,500 on the second, the prison sentences to run concurrently.

FRANK, *Circuit Judge*:

The Second Count

We think that Congress, as it lawfully may, provided that to "offer" a bribe and to "give" a bribe are two distinct crimes even when parts of a single transaction, since the one (to "give") involves an element which the other (to "offer") does not.[1] The test, as stated in *Morgan* v. *Devine*, 237 U. S. 632, 640, is whether "separate acts have been committed with the requisite criminal intent. * * *" The present case does not meet that test. Kratter, the principal government witness, testified as follows: On July 17, 1946, in New York City,[2] defendant offered him

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[1] *Blockburger* v. *United States*, 284 U. S. 299, 303-304; *Albrecht* v. *United States*, 273 U. S. 1, 11; *Burton* v. *United States*, 202 U. S. 344, 377; *Morgan* v. *Devine*, 237 U. S. 632, 640; *Gavieres* v. *United States*, 220 U. S. 338, 342; *Lindsay* v. *United States*, 134 F. (2d) 960, 961 (C. C. A. 10); *cf. American Tobacco Co.* v. *United States*, 328 U. S. 781, 787-788.

[2] New York City is in the Southern District of New York.

a bribe of $5,000, and he told defendant he would take it.[3] Defendant then said that, when he had the money, he would telephone Kratter. On July 26, defendant, on the telephone, told Kratter that he had the money and wanted to meet Kratter to give it to him. On July 29, Kratter by phone, arranged with defendant for a meeting at a room in the St. George Hotel in Brooklyn.[4] Kratter went to that room. His own words, as to what then occurred, follow: "A few minutes later there was a knock on the door. I opened the door and Mr. Michelson came in, and I closed the door after him. He dropped a package on a dresser or chifferobe, something like that that was in the hotel room, and he sat down and I sat down. I asked him if he

[3] Kratter's testimony as to that conversation is as follows:

> "Q. Did you and Mr. Michelson have a conversation while you were walking along together? A. Yes, a conversation ensued during the walk. Mr. Michelson kept insisting that I do something to straighten out his tax return and fix things up for him so he wouldn't get into too much trouble. He offered me $3,000 while we were walking toward the subway, and then he said, 'Make it $5,000.' I told him I wouldn't touch that kind of money, I wasn't interested in it, I didn't want to get mixed up in that situation. Then he kept insisting. We had walked about two or three blocks from his office, and I finally stopped in the street and kept talking to him. He refused to leave me, and insisted that we come to some sort of agreement regarding his tax situations. I finally told him —he said, 'Will you take $5,000?' And he told me he would pay another $5,000 to the Government. I finally said 'O. K.,' in order to get away from him, and he told me he would call me up when he had the money, and he asked me for my business card and home telephone. I gave him one of my cards and wrote down the phone number while we were standing on the street, and then we parted."

[4] Brooklyn is in the Eastern District of New York.

had the money, and he said, 'Yes, it is in the bag over there.' I took the bag, unwrapped it, and he took out a large number of five, ten and twenty-dollar bills, and he said, Mr. Michelson said, 'There is $5,000 there.' I made a quick count of the bills and satisfied myself that there was approximately $5,000 in the package * * * " Defendant's conduct at that Meeting in Brooklyn constituted his performance of the agreement of July 17—an illegal bargain resulting from a previously accepted offer—to give the $5,000 bribe. He did not on that day or at any other time in the Eastern District both offer and give. He merely gave.[5]

The offer of July 17 cannot sustain the conviction on count 2. For defendant made that offer in New York City in the Southern District, and the defendant was indicted and tried in the Eastern District. Had that offer been specified in the indictment, defendant, thus warned of the improper venue, would have waived the lack of proper venue by going to trial without interposing an objection.[6] The same might have been true if, during the trial, defendant had in some manner been put on notice that the government intended to rely on that New York City offer as a crime, for which he was being tried. But here there

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[5] Kratter testified that after he had thus received the money, "I asked Mr. Michelson what he wanted me to do for the money, and he told me he wanted me to turn in a report which would indicate that he owed about $1,200 on his 1943 tax return and about $900 on his 1942 return. He said that was all he wanted me to do. Then I told him, 'You understand the only reason I am doing this is because you insist upon it, isn't that so?' And he said, 'Yes, that is right.'"

This conversation did not show a new offer but merely arrangements for carrying out the details of the previous agreement.

[6] *United States* v. *Jones*, 162 F. (2d) 72 (C. C. A. 2).

was nothing so to notify him. Indeed, the trial judge, in his charge, told the jury that the issue was whether defendant gave or offered to give, or both, $5,000 to Kratter on July 29 at the Hotel St. George. We therefore conclude that we must reverse as to the second count.

Alleged Errors as to the First Count

1. The defendant called three character witnesses who testified that he had an excellent reputation for "honesty, truthfulness and being a law-abiding citizen." On cross examination, they were asked whether they had heard (a) that in 1927 he had been convicted in a New York court and sentenced to pay a fine of $100 or 30 days in jail, and (b) that in 1920 he had been arrested for receiving stolen goods.

The judge, out of the jury's presence, received the assurance of the government's counsel that defendant had been thus arrested in 1920. The defendant, on the witness-stand, had previously admitted the conviction in 1927. The judge, when these witnesses were being questioned, said: "However, I instruct the jury that what is happening now is this: the defendant has called character witnesses, and the basis for the evidence given by those character witnesses is the reputation of the defendant in the community, and since the defendant tenders the issue of his reputation the prosecution may ask the witness if she has heard of various incidents in his career. I say to you that regardless of her answer you are not to assume that the incidents asked about actually took place. All that is happening is that this witness' standard of opinion of the reputation

of the defendant is being tested. Is that clear?" In his charge to the jury, the judge said: "In connection with the character evidence in the case I permitted a question whether or not the witness knew that in 1920 this defendant had been arrested for receiving stolen goods. I tried to give you the instruction then that that question was permitted only to test the standards of character evidence that these character witnesses seemed to have. There isn't any proof in the case that could be produced before you legally within the rules of evidence that this defendant was arrested in 1920 for receiving stolen goods, and that fact you are not to hold against him; nor are you to assume what the consequences of that arrest were. You just drive it from your mind so far as he is concerned, and take it into consideration only in weighing the evidence of the character witnesses." The questions were of the kind often held proper in examining "character witnesses."[7] That being the rule, we see no abuse of discretion in permitting them to be asked here.[8] Defendant asserts error in putting

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[7] See, *e.g.*, *Mannix* v. *United States*, 140 F. (2d) 250, 252 (C. C. A. 4); *Josey* v. *United States*, 135 F. (2d) 809, 811 (App. D. C.); *Spalitto* v. *United States*, 39 F. (2d) 782, 785-787 (C. C. A. 8); *cf. Stewart* v. *United States*, 104 F. (2d) 234, 235 (App. D. C.).

[8] Wigmore, *Evidence* (3d ed. 1940) §988, after noting that "such inquiries are almost universally admitted," not as "impeachment by extrinsic testimony of particular acts of misconduct," but as means of testing the character "witness' grounds of knowledge," continues with these comments: "But the serious objection to them is that practically the above distinction between rumors of such conduct, as affecting reputation, and the fact of it as violating the rule against particular facts—cannot be maintained in the mind of the jury. The rumor of the misconduct, when admitted, goes far, in spite of all theory and of the judge's charge, towards fixing the misconduct

the question about the 1920 arrest to a witness who had known defendant only since 1932. We cannot agree, for she might have heard rumors of an arrest which happened before she knew him.

3. On direct examination by his own counsel, defendant testified to his conviction in 1927 on a charge of possessing counterfeit watch-dials, but that he had no other trouble since he had been in the United States. On cross examination, defendant testified that, in 1930, in an application signed by him for a license for vending second-hand jewelry, he had never been arrested for any offense. Thereupon he was asked whether he had stated in this applica-

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as a fact upon the other person, and thus does three improper things,—(1) it violates the fundamental rule of fairness that prohibits the use of such facts, (2) it gets at them by hearsay only, and not by trustworthy testimony, and (3) it leaves the other person no means of defending himself by denial or explanation, such as he would otherwise have had if the rule had allowed that conduct to be made the subject of an issue. Moreover, these are not occurrences of possibility, but of daily practice. This method of inquiry or cross-examination is frequently resorted to by counsel for the very purpose of injuring by indirection a character which they are forbidden directly to attack in that way; they rely upon the mere putting of the question (not caring that it is answered negatively) to convey their covert insinuation. The value of the inquiry for testing purposes is often so small and the opportunities of its abuse by underhand ways are so great that the practice may amount to little more than a mere subterfuge, and should be strictly supervised by forbidding it to counsel who do not use it in good faith."

Because, as Wigmore says, the jury almost surely cannot comprehend the judge's limiting instruction, the writer of this opinion wishes that the United States Supreme Court would tell us to follow what appears to be the Illinois rule, *i.e.*, that such questions are improper unless they relate to offenses similar to those for which the defendant is on trial. See *Aiken* v. *People*, 183 Ill. 215, 55 N. E. 695; *cf. People* v. *Hannon*, 381 Ill. 206, 44 N. E. (2d) 923.

tion that he had been convicted of "counterfeiting trademarks on watches." His counsel objected on the ground that the conviction had been for "possession of counterfeit." The court said, "Sustained on that ground." Government counsel then asked, "You did not say in that paper that you had been arrested and that you were convicted of that charge?" No objection was made. We find no prejudicial error.

4. Defendant complains that the judge in his charge unfairly interpreted the testimony of a witness, Osterfeld, in a manner prejudicial to defendant. We think the interpretation not unfair. But, even assuming the contrary, there is no reversible error. In the first place, defendant did not object to this part of the charge.[9] In the second place, the judge made it plain that, despite his comments on the evidence, the jury were to rely on their own recollection of the evidence.

AFFIRMED AS TO THE FIRST COUNT; REVERSED AS TO THE SECOND.

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[9] *United States* v. *Marino*, 141 F. (2d) 771 (C. C. A. 2). Nor did he object to a question the judge put to that witness, a question, moreover, which we think entirely proper.

Appendix B—Statute Involved

Title 18, United States Code, Section 91, states in part:

"Whoever shall promise, offer, or give, * * * any money or other thing of value, * * * to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, * * * with intent to influence his decision or action on any question, matter, cause or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or to omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the things so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made or tendered, and imprisoned not more than three years."

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 612

SOLOMON MICHELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 177–183) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered January 26, 1948 (R. 183–184). The petition for a writ of certiorari was filed February 20, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether the trial court erred in permitting the prosecutor to ask defendant's character witnesses on cross-examination whether they had ever heard that defendant had been arrested on a charge of receiving stolen goods.

STATEMENT

Petitioner was indicted in the District Court for the Eastern District of New York for bribery of a federal officer in violation of Section 39 of the Criminal Code (18 U. S. C. 91). The first count charged that he gave a bribe of $5,000 to Kratter, an agent of the Bureau of Internal Revenue, in connection with an income tax investigation; the second charged the offering of the same bribe (R. 2–3). After a jury trial, petitioner was found guilty on both counts; he was sentenced to 18 months' imprisonment on each count, the terms to run concurrently, and was fined $1 on the first count and $2,500 on the second (R. 163, 171–172). On appeal, the judgment was affirmed as to the first count, but reversed as to the second on the ground of improper venue (R. 177–184).

The payment of the $5,000 by petitioner to Agent Kratter was not disputed at the trial; the principal and "virtually the only issue" was whether petitioner was entrapped by Agent Kratter (see Pet. 4). The evidence for the Government may be summarized as follows:

Kratter testified that, having been assigned to investigate petitioner's records, he first visited petitioner's place of business[1] for about twenty minutes in the mid-afternoon of July 16, 1946, and made arrangements to begin the examination the following day (R. 8–10, 31, 33). He returned at about 11:00 a. m. on July 17, 1946, and began his investigation of the books (R. 10–11, 31–33). About 12:30 p. m. he asked petitioner for substantiation of certain entries (R. 11–12). Petitioner suggested that they go out to lunch together and during the meal he inquired what would have to be done to straighten out his returns. Kratter answered that he would have to finish the examination before he could say. (R. 13, 34.) After lunch, despite Kratter's desire to return to his examination of the books, petitioner insisted that they take a walk and discuss the matter. During the walk, which lasted an hour, petitioner offered Kratter first $100, then $250, then $300, and finally $800. After numerous refusals, Kratter, in order to get back to the store, at last agreed to take the money.[2] (R. 14–16, 35–37.) A short time after they had returned, petitioner dropped a package at Kratter's feet saying, "Here is the $800." When Kratter finished his examination at

[1] Petitioner, a second hand jewelry dealer, leased two counters in a large store occupied chiefly by jewelry merchants (R. 31, 81).

[2] Kratter testified that Internal Revenue Agents do not examine books unless the taxpayer or his accountant is present (R. 15).

about 4:00 p. m. he handed the package back to petitioner. Petitioner continued to insist, detained Kratter in the store, walked down the street with him, refused to leave him, and offered him $3,000, then $5,000. Finally Kratter, in order to get away, agreed to take the money, gave petitioner his home telephone number in response to petitioner's request, and then went home. (R. 16–19, 37–40.) On the following day, July 18, 1946, Kratter had an appointment for an examination of another matter in the morning, but in the afternoon he returned to his office and told an older agent of petitioner's offer[3] (R. 21, 41–42). The next day, July 19, 1946, he was taken to see Agent Yung, of the Intelligence Unit, and thereafter acted under Yung's direction (R. 21–22, 43, 65).

In the evening of July 19, 1946, petitioner called Kratter's home and left a telephone number for Kratter to call. On Monday morning, July 22, 1946, Kratter, in Yung's presence, called that number and asked what was wanted; petitioner answered that he was trying to get the money and told Kratter to call again Friday. Kratter did so, again in Yung's presence, and petitioner said he wanted to give him the money. Kratter suggested a meeting in a hotel room, and when petitioner objected, Kratter said he was taking the

[3] Kratter was relatively inexperienced, having been with the Bureau of Internal Revenue for only about six months (R. 7, 48–49).

money only because petitioner insisted and petitioner would have to follow his plan. (R. 22–27, 43, 66.)

On Monday morning, July 29, 1946, Yung, Kratter and four other agents set up a listening device in a hotel room and Kratter then called petitioner. When petitioner entered the room he dropped a package containing $5,000 on the dresser. He asked Kratter to report $900 owing on his 1942 tax return and $1200 on his 1943 return. Kratter said, "You understand the only reason I am doing this is because you insist upon it, isn't that so?" to which petitioner responded, "Yes, that is right." (R. 27–29, 44.) The other agents, having heard the conversation over the listening device in a nearby room, arrested petitioner when he stepped out into the hall (R. 29, 52, 55–62, 66–70, 72). Petitioner admitted to them that he had given the $5,000 to Kratter. When asked to explain, he made no accusation against Kratter, but said only that he would explain to the proper party. Agent Yung informed him that he was a representative of the Commissioner of Internal Revenue but petitioner still refused to explain. He was then taken to an Assistant United States Attorney's office, who informed him that he need not answer questions and that whatever he said might be used against him, but also for him. Petitioner said, "Anything I could say would only hurt me." (R. 29–30, 68–69.)

Petitioner testified in his own behalf that Kratter came to his place of business on the morning of July 15, 1946 (R. 81); that after he had been there a short time, he asked petitioner for $800 and said he had enough on petitioner to call in the F. B. I. and have him locked up (R. 83–84); that they went to lunch together and then took a walk, during which Kratter continued his threats and raised his demand to $1,000, and then to $5,000 (R. 86–89); that Kratter gave him his home telephone number when he left that afternoon and told him to call when he had the money (R. 90–91); that Kratter called several times in the next few days repeating his threats (R. 91–93); and that he finally took the money to Kratter in the hotel (R. 93–94). Gerstein, who occupied the counter next to petitioner in the store, also testified that Kratter's visit was on July 15, 1946 (R. 119), but although he was only six or seven feet away and heard Kratter and petitioner arguing, he did not hear Kratter make any threats, nor did petitioner at that time tell him of any demand (R. 120–122). Osterfeld, petitioner's accountant, also testified that Kratter came on July 15, 1946, and that petitioner told him that Kratter had asked for $5,000 (R. 132–133); but he admitted that he understood the demand to be, not for a bribe, but for back taxes (R. 134, 137).

ARGUMENT

The basic contention in the petition is that the trial court erroneously permitted the prosecuting attorney to cross-examine petitioner's character witnesses in respect of his arrest on a charge of receiving stolen property. Petitioner introduced five witnesses who testified that his reputation for honesty and truthfulness was excellent (R. 125–131, 137–139). Four of these witnesses were asked on cross-examination whether they had ever heard that petitioner had been arrested in 1920 for receiving stolen goods; all four gave negative answers (R. 126, 129, 131, 138–139). When the questions were asked, and again in the charge, the court carefully instructed the jury that there was no proof in the case that such arrest ever took place, and that the questions were permitted only to test the standards upon which the witnesses based their opinion of petitioner's character (R. 127, 130, 154). Furthermore, the court required of the prosecutor, as proof of his good faith, assurance that petitioner had been arrested for receiving stolen goods (R. 146–147).[4]

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[4] As evidence of this fact, the prosecutor tendered Exhibit 6, which the court had the reporter mark for identification (R. 147). While the exhibits are not in the printed record (see R. 175), the Government's brief in the circuit court of appeals states that this document was the record of petitioner's arrest in 1920.

1. The circuit courts of appeals have, without exception, held that when the accused puts his character in issue by bringing forward reputation witnesses, such witnesses may be asked on cross-examination whether they have heard of specific charges, or rumors, of other misconduct on the part of the accused. *Josey* v. *United States*, 135 F. 2d 809, 811 (App. D. C.); *United States* v. *Commerford*, 64 F. 2d 28, 30–31 (C. C. A. 2), certiorari denied, 289 U. S. 759; *Chiccarello* v. *United States*, 68 F. 2d 315 (C. C. A. 3); *Mannix* v. *United States*, 140 F. 2d 250, 252 (C. C. A. 4); *Proctor* v. *United States*, 100 F. 2d 350 (C. C. A. 5); *Lawrence* v. *United States*, 56 F. 2d 555, 556 (C. C. A. 7), certiorari denied, 286 U. S. 565; *Spalitto* v. *United States*, 39 F. 2d 782, 785–787 (C. C. A. 8); *Mitrovich* v. *United States*, 15 F. 2d 163, 164 (C. C. A. 9); *McBoyle* v. *United States*, 43 F. 2d 273, 275 (C. C. A. 10), reversed on other grounds, 283 U. S. 25.

Petitioner, relying upon 3 Wigmore, *Evidence* (3d ed. 1940), § 988, and two Illinois cases, *Aiken* v. *People*, 183 Ill. 215, 55 N. E. 695, and *People* v. *Hannon*, 381 Ill. 206, 44 N. E. 2d 923, contends (Pet. 6, 19–25) that the rule should be changed and that such cross-examination of character witnesses should be forbidden unless the questions relate to misconduct which has some connection with or relevance to the crime for which the defendant is being tried. A careful examination of the cited passage from Wigmore reveals that

he holds it to be "proper to probe the asserted reputation by learning whether such rumors have come to the witness' knowledge," but that, because of the inherent possibilities of abuse, the practice should be "strictly supervised by forbidding it to counsel who do not use it in good faith." And Wigmore criticizes the Illinois decisions as "misconceiving the nature of the problem and citing none of the cases pertinent." 3 Wigmore, *Evidence* (3d ed. 1940), § 988, footnote 1.

Of course, it is true that, just as the defendant's reputation witnesses must be limited in their testimony to the specific trait of character involved in the accusation, 1 Wigmore, *Evidence* (3d ed. 1940), § 59; *Morris* v. *District of Columbia*, 124 F. 2d 284 (App. D. C.), so also the cross-examination must be limited to charges or rumors of offenses involving conduct inconsistent with that trait.[5] *Josey* v. *United States, supra.* Here, where the trait of character involved was honesty, the relevance of a charge of receiving stolen goods is obvious.

2. But petitioner urges (Pet. 6, 13–19) that, even if the rule uniformly followed in the federal courts is correct, the trial court misapplied it in holding itself bound to permit the questions, whereas the cases hold that such questions may be excluded in the court's discretion when their mis-

[5] We think this must have been what Judge Frank, writing for the court below, had in mind in footnote 8 of the opinion (R. 181–183).

chievous effect outweighs their possible value as tests of the witness' standard of opinion. We find nothing in the record to indicate that the trial judge felt himself bound to allow the questions.[6] On the contrary, as we noted above (*supra*, p. 7), he required the prosecutor to show that the questions were based on fact, and he specifically stated that he was following Wigmore's suggestion that the asking of such questions be strictly supervised (R. 147). Nor was there an abuse of discretion in permitting the questions, for, as we have just pointed out, they were clearly relevant to petitioner's reputation for honesty. Petitioner insists that questions as to an arrest for receiving stolen goods twenty-six years prior to the present case had a mischievous effect outweighing any possible relevance (Pet. 14, 17, 21–22). If this had been a youthful indiscretion, or a totally isolated shadow upon his reputation for honesty we might agree. But petitioner was about thirty years of age at the time of the 1920 arrest and had already been engaged in the second-hand jewelry business for several years (R. 78–79). Furthermore, he admitted that in 1927 he had been convicted and fined for possession of counterfeit watch dials (R. 79–80, 101–102)—a matter which the prosecutor also brought to the attention

[6] Petitioner's objection at the trial was, not that the questions should be excluded as a matter of discretion, but that they should be excluded as attempts to impeach his character by proof of other arrests (R. 130).

of the reputation witnesses, without objection by petitioner (R. 126, 129, 131, 138). In a case involving a matter of financial honesty petitioner chose to introduce evidence as to his good reputation for business honesty. Under the circumstances we think the court was clearly within its discretion in permitting the witnesses to be examined as to whether their estimates took into consideration these derogatory reports in connection with his business dealings.[7]

3. In arguing that the disputed questions created undue prejudice, petitioner contends that the Government's case was not "strong" (Pet. 24), and he appears to challenge indirectly the sufficiency of the proof to show that the criminal plan originated with him and not with Kratter (see Pet. 4, 12, 21). We think it is clear from the evidence summarized in the Statement, *supra,* that the Government's case was by no means such that the disputed questions tipped the scales against petitioner. Of particular significance is the fact that during the meeting in the hotel room, petitioner admitted that he had insisted that Kratter do something for him (*supra,* p. 5), and the further fact that after his arrest, although given the opportunity, he made no accusation against Krat-

[7] Petitioner contends (Pet. 23) that the question as to the 1920 arrest should not have been put to one of his witnesses who had known him only since 1932. But, as the court below said (R. 181–182), she could have heard rumors of such arrest.

ter but said only that anything he might say would hurt him (*supra*, p. 5).[8]

CONCLUSION

The decision of the circuit court of appeals is correct and no conflict of decisions is involved. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

T. VINCENT QUINN,
Assistant Attorney General.

ROBERT S. ERDAHL,
JOSEPH M. HOWARD,
Attorneys.

MARCH 1948.

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[8] Petitioner also claims that it was improper for the prosecutor to ask him on cross-examination whether, in a 1930 application for a license as a vendor of second-hand jewelry, he had not failed to state that he had been convicted in 1927 of "counterfeiting trademarks on watches" (R. 100–101). Petitioner had testified himself on direct examination that he had been convicted in 1927 of possessing counterfeit watch dials (R. 79–80). His counsel objected to the prosecutor's question on the ground that the conviction had been for possession, not counterfeiting. The court sustained the objection "on that ground," and then rephrased the prosecutor's question. Petitioner answered it without further objection. (R. 101–102). Obviously, in view of the correction, no prejudice resulted from the original form of the question.

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No. 23

In the Supreme Court of the United States

October Term, 1948

SOLOMON MICHELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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Note, 71 A.L.R. 1504 — 20, 21, 30, 32
1 Stephen, *History of the Criminal Law of England* (1883), pp. 254-269 — 15
pp. 350-354 — 16
pp. 416-417 — 16
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1 Wigmore, *Evidence* (3rd ed. 1940), § 56 15, 16
§ 57 15, 16
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3 Wigmore, *Evidence* (3rd ed. 1940), § 927 27
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5 Wigmore, *Evidence* (3rd ed. 1940), § 1617 27

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 23

SOLOMON MICHELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 155-161) is reported at 165 F. 2d 732.

JURISDICTION

The judgment of the court of appeals was entered January 26, 1948 (R. 161-162). The petition for a writ of certiorari was filed February 20, 1948, and was granted April 5, 1948 (R. 163). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925 (now 28 U.S.C. 1254). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Whether, in a trial for bribery of a federal officer, it was error to permit the prosecutor to ask petitioner's reputation witnesses on cross-examination whether they had ever heard that petitioner had been arrested some years previously on a charge of receiving stolen goods.

STATEMENT

Petitioner was indicted in the District Court for the Eastern District of New York on a charge of bribing a federal officer, in violation of Section 39 of the Criminal Code (18 U. S. C. 91). The first count charged that petitioner gave $5,000 to Kratter, an agent of the Bureau of Internal Revenue, with intent to influence Kratter's decision with respect to petitioner's income tax returns; the second count charged the offering of the same bribe (R. 2-3). After a jury trial, petitioner was found guilty on both counts; he was sentenced to 18 months' imprisonment on each count, the terms to run concurrently, and was fined $1 on the first count and $2,500 on the second (R. 144, 151). On appeal, the judgment was affirmed as to the first count, but reversed as to the second on the ground of improper venue since the proof showed the offer to have taken place in the Southern District of New York (R. 155-162).

At the trial petitioner did not dispute the fact that he had paid the $5,000 to Kratter; "the principal and virtually the only issue" was whether petitioner was entrapped by Kratter (Br. 3). In this Court, petitioner does not specifically dispute the legal sufficiency of the evidence on the issue of entrapment; the only question presented here concerns the propriety of the cross-examination of petitioner's reputation witnesses. However, since petitioner claims (Br. 5-6, 18) that the controversy was a close one and that the Government's case was not "strong," and since we on the contrary feel that the alleged error on cross-examination, even if we were to concede it, would be harmless in view of the strength of the Government's case, we shall briefly set forth the evidence in support of the verdict before stating the facts relevant to the cross examination of the reputation witnesses.

1. The evidence for the Government, so far as pertinent to the issue of entrapment, may be summarized as follows:

Kratter, an agent of the Bureau of Internal Revenue, having been assigned to investigate petitioner's income tax returns, first visited the latter's place of business [1] for about 20 minutes in the mid-afternoon of July 16, 1946, and made arrangements with petitioner and his accountant to begin the ex-

[1] Petitioner is a second hand jewelry dealer. He leased two counters in a large store, located at 74 Bowery in the Borough of Manhattan, occupied chiefly by jewelry merchants (R. 26, 71).

amination the following day (R. 6-8, 26, 28). Kratter returned at about 11:00 a. m. on July 17, 1946, and began his investigation of petitioner's records (R. 8, 26-28). He asked petitioner for substantiation of certain cash purchases, cash deposits and checks recorded in the books, but petitioner "could not explain them" (R. 9-10). At about 1:15 p. m. Kratter started out for lunch and petitioner said that he would go along. During the meal petitioner asked what could be done to straighten out his returns; Kratter answered that he would have to complete the investigation before he could say. (R. 10-11, 28-29.) After lunch, despite Kratter's desire to return to his examination of the books, petitioner insisted that they take a walk and discuss the tax returns.[2] During the walk, which lasted an hour, petitioner offered Kratter first $100, then $250, then $300, and finally $800 to fix up the matter so that he would not have to pay too much to the Government. After numerous refusals, Kratter, in order to get back to the store, at last agreed to take $800. (R. 11-12, 30-31.) Soon after they had returned to the store and Kratter had resumed his examination at a desk behind the counter, petitioner dropped a package at his feet saying, "Here is the $800." During the afternoon Kratter again called petitioner's attention to various deposits recorded in the books, but petitioner gave no explanation of

[2] Kratter testified that Internal Revenue Agents never examine books unless the taxpayer or his accountant is present (R. 12, 14).

them. When Kratter completed his examination, at about 4:00 p. m., he picked up the package and handed it to petitioner, telling him he could not take the money. He also told petitioner that the books showed deposits of $35,000 and numerous cash purchases which were unexplained, that it appeared petitioner owed the Government about $25,000, and that he would have to turn the case over to the special agents. Petitioner insisted that Kratter fix things up for him; he detained Kratter in the store, walked down the street with him, refused to leave him, and offered him first $3,000, then $5,000, and said he would pay an additional $5,000 to the Government. Finally Kratter, in order to get away, agreed to take the money. Petitioner said he would call him when he had the money, and asked for Kratter's home telephone number. Kratter then went home without returning to his office. (R. 12-16, 31-35.) On the following morning, July 18, Kratter had an appointment for an examination in another matter, but in the afternoon he returned to his office and reported petitioner's offer to an older agent[3] (R. 17, 36). (Up to this point the Government's case depended upon the uncorroborated evidence of Kratter. In all that follows the Government's version is supported by the testimony of several witnesses.)

[3] Kratter was relatively inexperienced, having been with the Bureau of Internal Revenue for only about six months (R. 5, 40).

On July 19, the day after he had reported the matter, Kratter was taken to see Agent Yung of the Intelligence Unit, and thereafter he acted under Yung's direction (R. 17, 37-38, 57-58). In the evening of that same day, which was a Friday, petitioner called Kratter's home and left a telephone number for Kratter to call. On Monday morning, July 22, Kratter, in Yung's presence, called that number and asked what was wanted; petitioner answered that he was trying to get the money and told Kratter to call him again on Friday. On Friday Kratter called, again in Yung's presence, and petitioner said that he wanted to give him the money. Kratter suggested a meeting in a hotel room, and, when petitioner objected, Kratter told him that he had never wanted to get involved in the matter, that he was taking the money only because petitioner insisted, and that petitioner would have to follow his plan or he would drop the whole thing. (R. 18-22, 38, 58.)

On Monday morning, July 29, Yung, Kratter and four other agents set up a listening device in a room in a Brooklyn hotel; Kratter then called petitioner to tell him where he was and petitioner said he would come right over. When petitioner entered the room he dropped a package containing $5,000 on the dresser. Kratter asked what he wanted done in return for the money. Petitioner replied that he wished Kratter to report $900 owing on his 1942 tax return and $1,200 on his 1943 return. Kratter said, "You understand the only reason I am doing

this is because you insist upon it, isn't that so?" to which petitioner responded, "Yes, that is right." (R. 22-24, 39.) The other agents, having heard the conversation over the listening device in a nearby room, arrested petitioner when he stepped out into the hall (R. 24, 46, 49-55, 58-60, 63). Petitioner admitted to them that he had given the $5,000 to Kratter. When asked for an explanation, he made no accusation against Kratter; he did not protest that he believed he was paying the money to the Government for back taxes; he said only that he would explain to the proper party. Agent Yung then informed him that he was a representative of the Commissioner of Internal Revenue, but petitioner still refused to explain. He was then taken to the office of an Assistant United States Attorney, where he was informed that he need not answer questions and that whatever he said might be used against him, though it might also be used for him. He said nothing to indicate that Kratter had made demands upon him. His only statement was, "Anything I could say would only hurt me." (R. 24, 60-61.)

Petitioner testified in his own behalf that Kratter came to his place of business on the morning of July 15 (R. 71); that after he had been there a short time, he asked petitioner for $800 and said he had enough on petitioner to call in the F. B. I. and have him locked up (R. 73-74); that Kratter continued his threats and raised his demands to $1,000 and then to $5,000 during the walk after

lunch (R. 77-78); that petitioner was frightened (R. 73, 77, 78); that Kratter gave him his home telephone number and told him to call when he had the money (R. 79); that Kratter repeated his threats in the next few days (R. 80-81); and that he finally took the money to Kratter at the hotel (R. 81-82). He admitted that in 1927 in New York City he had pleaded guilty and paid a fine of $100 on a charge of possessing counterfeit watch dials (R. 70; cf. R. 89). On cross-examination he admitted that in 1930 he had signed a second-hand jeweler's license application which contained a denial that he had ever been arrested or summoned for any offense (R. 88-89). His statement that Kratter's first visit occurred on July 15 was corroborated by two defense witnesses, Gerstein and Osterfeld (R. 105, 118).

2. The facts relevant to the cross-examination of the reputation witnesses may be summarized as follows:

After petitioner had left the stand, defense counsel introduced five reputation witnesses. All of them had known petitioner for at least 15 years, and two had been acquainted with him for about 30 years. Three of these witnesses testified that petitioner's reputation for honesty and truthfulness was excellent; the other two said that they had never heard anything derogatory about him. Four of them were asked on cross-examination whether they had ever heard that petitioner had been convicted in 1927 on the counterfeit watch dial charge

and sentenced to pay $100 or spend 30 days in jail. They were also asked, and this is the question of which petitioner is now complaining, whether they had ever heard that he had been arrested in New York City in 1920 on a charge of receiving stolen goods; all four denied having heard of this charge. (R. 111-117, 123-124.) When the question as to the arrest was first asked, the court instructed the jury as follows (R. 113):

> * * * I instruct the jury that what is happening now is this: the defendant has called character witnesses, and the basis for the evidence given by those character witnesses is the reputation of the defendant in the community, and since the defendant tenders the issue of his reputation the prosecution may ask the witness if she has heard of various incidents in his career. I say to you that regardless of her answer you are not to assume that the incidents asked about actually took place. All that is happening is that this witness' standard of opinion of the reputation of the defendant is being tested. Is that clear?

After the question had been asked of a second witness, the court said (R. 116):

> Again I say to the jury there is no proof that Mr. Michelson was arrested for receiving stolen goods in 1920, there isn't any such proof. All this witness has been asked is whether he had heard of that. There is nothing before you on that issue. Now would you base your decision on the case fairly in spite of the fact

that that question has been asked? You would? All right.

And in its final charge to the jury, the court reiterated the same warning (R. 137):

> In connection with the character evidence in the case I permitted a question whether or not the witness knew that in 1920 this defendant had been arrested for receiving stolen goods: I tried to give you the instruction then that that question was permitted only to test the standards of character evidence that these character witnesses seemed to have. There isn't any proof in the case that could be produced before you legally within the rules of evidence that this defendant was arrested in 1920 for receiving stolen goods, and that fact you are not to hold against him; nor are you to assume what the consequences of that arrest were. You just drive it from your mind so far as he is concerned, and take it into consideration only in weighing the evidence of the character witnesses.

Furthermore, the court required of the prosecutor, as proof of his good faith in having asked the question, assurance that it had basis in fact. As evidence of this the prosecutor submitted a photostatic copy of the 1930 license application containing a notation of the 1920 arrest. (R. 130-131; see Government's Exhibit 6.)[4]

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[4] Government's Exhibit 6 was not introduced in evidence, but was merely marked for identification. It was not included in the record forwarded to the circuit court of appeals. We

SUMMARY OF ARGUMENT

"If the prisoner, having a bad character, misleads the Court by calling witnesses to say that he has a good one, in the interests of truth and justice the false impression should be removed." Erle, C. J., in *Regina* v. *Rowton*, Le. & Ca. 520, 533. Since the early part of the nineteenth century the courts have, almost unanimously, permitted the prosecution, as one method of removing the false impression, to ask reputation witnesses whether they have ever heard rumors of certain specific conduct of the defendant inconsistent with the reputation ascribed to him. The object is not to prove the truth of the derogatory rumor but to prove that the asserted reputation is not consistent with the witness' knowledge of a derogatory rumor. The contrary Illinois decisions rest upon the mistaken assumption that the object is to prove bad character by proving the truth of specific bad acts.

The scope of such cross-examination rests within the discretion of the trial court, but because of the obvious possibilities of abuse the asking of the questions should be strictly supervised. Here, where the reputation witnesses were asked whether they had heard that petitioner has been arrested in 1920 for receiving stolen goods, the court required of the prosecutor a showing that the cross-examination had a basis in petitioner's past, and carefully and repeatedly instructed the jury as to

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have, therefore, obtained the exhibit and have lodged it with the Clerk of this Court.

the purpose for which the question could be considered. We submit that the question was relevant on the issue of the witnesses' knowledge of the petitioner's reputation, and that the court did not exceed the bounds of its discretion in permitting it to be asked.

Even conceding *arguendo* that the ruling was erroneous, we do not think that the asking of the question can have had any effect upon petitioner's substantial rights. He had already admitted to the jury that he had bribed Kratter, that he had previously been convicted of another offense reflecting upon his honesty, and that he had filed a false license application. Consequently, the effect of this question upon the jury's opinion of his reputation must have been negligible. Furthermore, on the issue of entrapment, petitioner's only real defense, the great weight of the evidence is against him.

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN PERMITTING THE REPUTATION WITNESSES TO BE ASKED ON CROSS-EXAMINATION WHETHER THEY HAD EVER HEARD THAT PETITIONER HAD BEEN ARRESTED IN 1920

The issue here presented is an extremely narrow one, involving only one small aspect of the very considerable field of character evidence. The defendant in a criminal trial may offer proof that his character is such as to render it highly improbable that he committed the alleged offense. This he

may do through witnesses who testify that his reputation with respect to the pertinent trait of character is excellent. We are here concerned only with the extent to which such witnesses may be cross-examined as to their knowledge of rumors or charges attributing certain specific acts of misconduct to the defendant. The issue is simply the extent to which the prosecution in a federal criminal case should be permitted to test the basis for a reputation witness' testimony by asking him whether he has heard certain rumors or charges inconsistent with the reputation he has ascribed to the defendant, and whether the question asked in the instant case exceeded the bounds of the court's discretion.

One important source of confusion should be noted at the outset. All the prosecution seeks to do by such cross-examination is to establish whether the witness has *heard* a derogatory rumor. It does not seek to establish the *truth* of the rumored misconduct. By offering reputation witnesses the defendant makes his reputation an issue. Such testimony is calculated to support the double inference that since his reputation is excellent, his character, i.e., his moral disposition, must also be excellent; and that since his character is excellent, it is highly improbable that he committed the alleged offense. By cross-examination of the sort we have here the prosecution endeavors to undermine the foundation of these inferences by showing that the witnesses who testified that the defendant's

reputation is blameless are actually aware of certain derogatory public reports. But the witnesses are not asked whether there is any truth in the reports. The sole issue at this point is the defendant's reputation. Consequently such cross-examination does not conflict with that "general and absolute rule of exclusion" [5] which forbids resort to *proof* of particular bad acts to show that the defendant does not have the good character he affirms.

A. THE RULE PERMITTING SUCH CROSS-EXAMINATION IS SUPPORTED BY LOGIC, BY AN UNBROKEN LINE OF AUTHORITY IN THE FEDERAL COURTS, AND BY THE VAST MAJORITY OF DECISIONS IN THE STATE COURTS.

1. *The historical and logical bases for the rule.*— When the defendant in a criminal case chooses to support his alleged innocence of the offense charged by producing reputation witnesses, Wigmore, summarizing the authorities, states that it is almost universally permitted to the prosecution to probe the asserted reputation by asking the witnesses whether they have heard certain derogatory rumors concerning the defendant. 3 Wigmore, *Evidence* (3rd ed. 1940), § 988. The origin of the rule permitting such cross-examination is obscure. It seems to have developed in the late eighteenth or early nineteenth century as a logical consequence of the right finally accorded criminal defendants of presenting sworn witnesses, including, of course, reputation witnesses, in their own behalf.

[5] 1 Wigmore, *Evidence* (3rd ed. 1940), § 193.

In the history of the common law the rules of character evidence have undergone metamorphosis. Today we regard it as one of the distinctive features of the common law that the defendant's character, good or bad, is not a factor to be considered in determining guilt unless he shall have first opened the issue himself; and even then, the evidence is confined to the defendant's reputation, particular acts and individual opinions being excluded.[6] But this has not always been the rule. In the early stages of the common law, when the jury functioned chiefly as a body of witnesses and when its members were specifically chosen because they were neighbors of the defendant and supposedly knew the truth as to the accusation, such evidence must frequently have played an important part in the decision.[7] When in later days the jury had attained its present status as judge of the evidence, the prosecution was permitted to show the defendant's evil character and even his particular bad acts,[8] but the defendant himself, by reason of the prohibition against witnesses for the defense, was deprived of the right to offer proof of good charac-

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[6] *Josey* v. *United States*, 135 F. 2d 809, 811 (App. D.C.); see also 1 Wigmore, *Evidence* (3rd ed. 1940), §§ 56, 57, 58, 193, 195. Of course, all such evidence is clearly relevant to show character, and it is freely used in criminal trials on the continent today. 1 Wigmore, *Evidence* (3rd ed. 1940), § 193. But in the common law system all evidence of particular offenses is now excluded because, as Wigmore says, its tendency is to prove too much. 1 Wigmore, *Evidence* (3rd ed. 1940), § 194.

[7] See 1 Stephen, *History of the Criminal Law of England* (1883), pp. 254-260, 449.

[8] 1 Wigmore, *Evidence* (3rd ed. 1940), § 194.

ter.[9] In the decades following 1680, roughly speaking, several changes seem to have taken place which gave to the common law of character evidence the shape it bears today. The defendant gained the right to present sworn witnesses in his own behalf;[10] the prosecution lost the right to give evidence of the defendant's particular bad acts;[11] the defendant was allowed to offer evidence of his good reputation, at first only in capital cases, but later in any criminal case;[12] and, finally, the prosecution was prohibited from presenting evidence of the defendant's character until he had opened up the subject himself, and was restricted solely to rebuttal by evidence of the defendant's bad general reputation.[13]

We think it clear, then, that the rule permitting the prosecution to test the accuracy of the knowledge of the defendant's reputation witnesses has arisen in comparatively recent times as a logical consequence of this change in the law of character evidence. The weights in the scales of character evidence have been shifted sharply in favor of the defendant. He may now rely on his good reputation as showing the improbability of guilt. What

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[9] 1 Stephen, *History of the Criminal Law of England* (1883), pp. 350-354.

[10] 1 Stephen, *History of the Criminal Law of England* (1883), pp. 416-417.

[11] 1 Wigmore, *Evidence* (3rd ed. 1940), §194.

[12] 1 Stephen, *History of the Criminal Law of England* (1883), p. 449; 1 Wigmore, *Evidence* (3rd ed. 1940), §56.

[13] 1 Wigmore, *Evidence* (3rd ed. 1940), §57; *Regina* v. *Rowton*, Le. & Ca. 520.

the reputation witnesses in effect declare is that the general and unqualified concensus in the community is that the defendant's reputation is good i.e., "either (a) that the testifier has never heard any ill spoken of the other or (b) that the sum of the expressed opinion of him is favorable." 3 Wigmore, *Evidence* (3rd ed. 1940), § 988. But "the admission of testimony of good reputation is of doubtful value and often deceptive where there is not applied to it the acid test of cross-examination to prove the accuracy of the testimony and the standard by which the witness measures reputation." *Commonwealth* v. *Becker*, 326 Pa. 105, 115, 191 A. 351, 356. The need for such a rule is manifest, for "if the prisoner, having a bad character, misleads the Court by calling witnesses to say that he has a good one, in the interests of truth and justice the false impression should be removed." Erle, C. J., in *Regina* v. *Rowton*, Le. & Ca. 520, 533. Consequently, as Wigmore points out, the courts have almost universally permitted the prosecution to ask such witnesses on cross-examination whether they have heard [14] rumors of certain specific past misconduct on the part of the defendant. The rationale of the rule rests in this, that the word of a witness who has testified that the defendant's repu-

[14] Thus the proper form of question to be put to the witness is, "Have you ever heard * * *?" It is improper to ask the witness, "Do you know * * *?" *Stewart* v. *United States*, 104 F. 2d 234 (App. D.C.). And it is improper to state the question hypothetically, "Would your opinion still be the same if you heard * * *?" Cf. *Little* v. *United States*, 93 F. 2d 401 (C.C.A. 8), certiorari denied, 303 U. S. 644.

tation is good, or that he has never heard ill of him, will be weakened or destroyed in the minds of the jury if he admits knowledge of derogatory rumors.

Keeping in mind the distinction noted above (*supra*, p. 13), i.e., that what is involved in such cross-examination is merely the *hearing*, and not the *truth*, of the derogatory rumors, we find that the rule works no undue hardship upon the defendant, so long as the questions are strictly supervised by the court. The defendant's reputation, though relevant, does not become an issue unless he injects it into the case himself. He does so in the hope of building upon the testimony of his reputation witnesses the double inference of good character and improbability of guilt. If the witnesses testify that they have never heard anything against the defendant, and yet they admit upon cross-examination to having heard derogatory rumors, their assertions are obviously inaccurate and discredited. If the witnesses testify positively that the defendant's reputation is good, but admit knowledge of derogatory rumors, the standards by which they judge reputation will appear suspect. Of course, to obviate abuse, the asking of such questions should be strictly supervised by the trial court. The defendant is protected by the court's strict refusal to permit such questions except upon a showing by the prosecutor that they are asked in good faith, and not for mere purposes of innuendo, and by the court's instruction to the jury that there

is no proof of the truth of the rumors, that they constitute no evidence of guilt, and that they are to be used only to test the accuracy or probative value of the evidence as to the defendant's reputation. See 3 Wigmore, *Evidence* (3rd ed. 1940), § 988.[15]

2. *The state of the authorities.*—The earliest recorded cases permitting such cross-examination of reputation witnesses appear to be *Rex* v. *Hodgkiss*, 7 C. & P. 298 (1836), and *Regina* v. *Wood*, 5 Jur. 225 (1841). The reports of these two cases are meager and not of much value, except that by the casual manner of their treatment they indicate an already well-established rule.[16]

The circuit courts of appeals have, without exception, held that when the accused puts his reputation in issue, the witnesses may be asked on cross-examination whether they have heard of specific charges, or rumors, of other misconduct on the

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[15] Furthermore, the witness may, if necessary, give on redirect examination a fuller explanation of the content of the rumor, i.e., of what is publicly said, though he may not go into the matter of the truth of the rumor. *State* v. *Doris*, 51 Ore. 136, 160-161, 94 P. 44, 51-52. And cf. *Sullivan* v. *United States*, 75 F. 2d 622 (C.C.A. 9), certiorari denied, 295 U. S. 757.

[16] The practice seems to be rare in English trials. Stone, *Cross-examination by the Prosecution at Common Law and under the Criminal Evidence Act*, 51 L.Q.R. 443, 458-459. Perhaps the reason may be that, as stated in *Regina* v. *Rowton*, Le. & Ca. 520, 529, 538, the prosecution usually issues a warning beforehand if it is able to rebut character evidence. As a result of the adoption of the Criminal Evidence Act in 1898, the common law rules governing character evidence seem to have been enlarged to permit reputation witnesses to be asked as to the fact, and not merely as to the rumor, of the defendant's past bad acts. Stone, *supra*, at 462, 459; cf. *Rex* v. *Waldman*, 24 Cr. App. R. 204 (1934).

part of the accused. The earliest case appears to be *Jung Quey* v. *United States*, 222 Fed. 766 (C.C.A. 9), decided in 1915. See also *Josey* v. *United States*, 135 F. 2d 809, 811 (App. D. C.); *United States* v. *Commerford*, 64 F. 2d 28, 30-31 (C.C.A. 2), certiorari denied, 289 U. S. 759; *Chiccarello* v. *United States*, 68 F. 2d 315 (C.C.A. 3); *Mannix* v. *United States*, 140 F. 2d 250, 252 (C.C.A. 4); *Proctor* v. *United States*, 100 F. 2d 350 (C.C.A. 5); *Lawrence* v. *United States*, 56 F. 2d 555, 556 (C.C.A. 7), certiorari denied, 286 U. S. 565; *Spalitto* v. *United States*, 39 F. 2d 782, 785-787 (C.C.A. 8); *Mitrovich* v. *United States*, 15 F. 2d 163, 164 (C.C.A. 9); *McBoyle* v. *United States*, 43 F. 2d 273, 275 (C.C.A. 10), reversed on other grounds, 283 U. S. 25.

Although there are occasional aberrant decisions resulting from a misunderstanding of the purpose of the rule, the overwhelming majority of the state courts permit such cross-examination. The cases have been collected and summarized exhaustively in Professor Wigmore's work[17] and in a Note at 71 A.L.R. 1504. Early decisions to the contrary in Florida and Nebraska have been overruled. In North Carolina the law still seems to be in some doubt.

The supposed Illinois rule, to which petitioner refers (Br. 15-17), arose from the confusion which we have already noted, namely, the failure to dis-

[17] 3 Wigmore, *Evidence* (3rd ed. 1940), § 988, fn. 1.

tinguish between proof of the *hearing* of a rumor and proof of the *truth* of the rumor. Thus in *Aiken* v. *People*, 183 Ill. 215; 55 N. E. 695, a reputation witness was asked on cross-examination whether he had heard certain derogatory rumors. The Supreme Court of Illinois held the allowance of the question erroneous. But the authorities relied upon by the court are those which prohibit the prosecution from proving the truth of specific acts of misconduct on the part of the defendant. The above cited A.L.R. note calls attention to this inconsistency, and Wigmore criticises the decision as "misconceiving the nature of the problem and citing none of the cases pertinent." In the latest case on the subject in that state, the Supreme Court of Illinois took note of the fact that the *Aiken* decision was contrary to the great weight of authority. *People* v. *Hannon*, 384 Ill. 206, 44 N. E. 2d 923. This may be an indication that Illinois will abandon its solitary position at the earliest opportunity. In the *Hannon* case it was not necessary to decide the point. The prosecutor's questions were held erroneous because they sought to determine the reputation witness' knowledge of the fact, and not of the rumor, and because the acts inquired about were not connected with the specific trait of character involved in the alleged offense.[18]

[18] The author of the opinion in the court below, referring to the *Hannon* and *Aiken* cases, appended a footnote (R. 159-161) to the effect that questions of the type involved in this case

3. *Wigmore's criticism of the rule.*—Petitioner refers to Wigmore's criticism of the rule (Br. 9, 13-19, 16). We do not deny the difficulty in maintaining in the minds of the jury the distinction between a character witness's knowledge or lack of knowledge of a rumor of misconduct as affecting the credibility of testimony on reputation, and the use of such evidence so as to violate the rule against evidence of particular bad acts. Nor do we deny the possibility of abuse by counsel who may not act in good faith in making the inquiry. But Wigmore himself points out both the necessity and the value of this method of testing the reputation witnesses' testimony. He states that such inquiry is almost universally permitted, and a careful reading of his text makes manifest that he condemns the prac-

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ought to be excluded "unless they relate to offenses similar to those for which the defendant is on trial." This appears to be a further confusion of the present rule with that other rule which prohibits proof of similar crimes of the defendant except on the issue of intent. Here the issue is reputation, not intent. We think it clear that all derogatory rumors which are current as to a man's past are relevant to the issue of his reputation, though they may have no relevance to prove his intent in committing the particular offense alleged. We submit that Judge Frank's suggested limitation is, therefore, inconsistent with the very purpose of the rule, which is to permit a testing of the reputation witnesses' testimony on as broad a basis as that which the witnesses have asserted, i.e., that the general concensus of opinion of the defendant's reputation is good or that the witnesses have never heard any evil report.

Of course, it has always been the law that, just as the reputation witnesses must be limited in their testimony to the specific trait of character involved in the accusation, 1 Wigmore, *Evidence* (3rd ed. 1940), §59; *Morris* v. *District of Columbia*, 124 F. 2d 284 (App. D.C.), so also the cross-examination must be limited to charges or rumors of offenses involving conduct inconsistent with that trait. *Josey* v. *United States*, *supra*.

tice only when it is not "strictly supervised by forbidding it to counsel who do not use it in good faith." 3 Wigmore, *Evidence* (3rd ed. 1940), § 988.

We think we have sufficiently demonstrated that the rule allowing such cross-examination is supported by logic and by the well-nigh unanimous stand of the authorities. It remains to be considered whether the particular question asked in this case was proper, or whether the court misapplied the rule, failed to exercise the strict supervision required of it, and abused its discretion in allowing the question.

B. THERE WAS NEITHER ERROR NOR ABUSE OF DISCRETION IN THE TRIAL COURT'S APPLICATION OF THE RULE.

Petitioner urges that the trial court misapplied the rule. It is contended that the court deemed itself bound to permit the questions, whereas the authorities hold that such questions may be excluded in the court's discretion (Br. 10). In other words, it is alleged that the court failed to exercise its discretionary power. We find nothing in the record to indicate that the court felt bound to allow the questions. On the contrary, the trial judge was clearly aware that he had the power to exclude the questions, for as we noted above (*supra*, p. 10), he required the prosecutor to show that they were based on fact, and he specifically stated that he was following Wigmore's suggestion that the asking of such questions be strictly supervised (R.

130-131). Furthermore, defense counsel did not at the trial object that the questions should be excluded as a matter of discretion. His contention was that they should be excluded absolutely. Thus, the second time the question was asked, the following colloquy appears (R. 115-116):

> Mr. CASTELLANO. I renew the objection on the ground that it is irrelevant.
>
> The COURT. Yes, but the cases specifically cover that situation.
>
> Mr. CASTELLANO. I am familiar with those cases relating to convictions.
>
> The COURT. No, Mr. Castellano: I am talking about the cross-examination of a character witness. I am wondering whether you had any special point about it, because the cases seem quite clear.
>
> Mr. CASTELLANO. All right.
>
> The COURT. Have you any special point aside from the question of direct proof in order to impeach a person's character that you may not prove an arrest? Are you applying that law to this?
>
> Mr. CASTELLANO. That is right.
>
> The COURT. Well then, I overrule your objection on that with an exception to you.
>
> Mr. CASTELLANO. Yes.

It is apparent that defense counsel was thinking of the rule which prohibits impeachment of a witness' character for truthfulness by cross-examination as to acts of misconduct not followed by conviction. *Little* v. *United States*, 93 F. 2d 401, 408

(C.C.A. 8), certiorari denied, 303 U. S. 644. Consequently, exclusion on discretionary grounds was never actually requested of the trial court.

But we do not think the ruling could be termed abusive, even if there had been a proper appeal to the court's discretion. Various aspects of the question must be considered: the basis and the form of the question, the nature, the place and the time of the rumored offense, and the type of action, if any, taken by the authorities. As we have seen, the prosecutor established a foundation by producing the copy of the license application containing the notation of petitioner's arrest (*supra*, p. 10). The form of the questions was proper. The witnesses were asked, not "Do you know?", but "Did you ever hear?"—thus the evidence sought related to the hearing, not to the truth, of the rumor. The place of the rumored misconduct was New York City, which was also the location of the asserted reputation. And the nature of the misconduct, receiving stolen goods, was clearly relevant to petitioner's honesty, the trait of character involved in a trial for bribery. The dispute here is whether the trial court erred or abused its discretion in permitting cross-examination as to a mere arrest which was quite remote in time.

Petitioner's chief contention now is that the prosecution should be forbidden to ask the reputation witnesses whether they have heard rumors of arrests which did not result in convictions (Br. 8-9, 11-13, 14, 17). It appears to have been un-

questioned until now that the rumor of a mere arrest on a prior charge involving the pertinent moral trait might be used in testing the accuracy of the asserted reputation. See, e.g., *Stewart* v. *United States*, 104 F. 2d 234 (App. D.C.); *Spalitto* v. *United States*, 39 F. 2d 782, 785 (C.C.A. 8); *Clark* v. *United States*, 23 F. 2d 335 (App. D.C.); *Filippelli* v. *United States*, 6 F. 2d 124, 125 (C.C.A. 9); *People* v. *Moran*, 144 Cal. 48, 62, 77 P. 777, 783; *Randall* v. *State*, 132 Ind. 539, 542, 32 N. E. 305, 306; *State* v. *McDonald*, 57 Kan. 537, 539, 46 P. 966, 967; *State* v. *Oteri*, 128 La. 939, 947, 55 So. 582, 585; *State* v. *Finkelstein*, 213 S. W. 465, 467 (Mo.). Petitioner refers to no authority to the contrary. Wigmore, in the section cited in petitioner's brief (Br. 9), and the cases cited by petitioner (Br. 14) are referring to the rule which forbids *impeachment of the character of a witness* by questions as to a mere arrest. The reason for that rule is that the mere fact of having been arrested does not in itself indicate a defect in *character*. But, to repeat, the issue here is *reputation*, and an arrest for an offense involving moral turpitude may of course, even though unjustified, be damaging to reputation, for the general public knows that arrests are not normally made without some cause. The general concensus of opinion as to the arrested person's reputation will be lowered somewhat unless, and until, the arrest is satisfactorily explained. The civil courts have recognized the validity of this reasoning, for damage to

reputation is one of the elements to be considered in measuring the compensation to be awarded for false imprisonment. *Beckwith* v. *Bean*, 98 U. S. 266, 276. And printing a baseless report of an arrest is libelous. *Washington Post Co.* v. *Kelly*, 38 F. 2d 151 (App. D.C.). Since we are concerned here only with whether the witnesses have accurately portrayed the defendant's reputation, reports of his arrest seem clearly to have relevance. The jury had the right to know whether the witnesses, who testified that petitioner's reputation was, in general, good, knew of the rumor of his arrest and had taken it into consideration in forming their estimate of his reputation.

Nor do we think that the mere fact that the arrest occurred in 1920, twenty-six years before the present trial, called for the exclusion of the prosecutor's question. It is true that the character with which we are concerned is the defendant's character at the time of the alleged offense; but not only present, but even past, reputation has relevance to establish present character. 3 and 5 Wigmore, *Evidence* (3rd ed. 1940), §§927, 1617. Furthermore, a man's present reputation is made up of opinions, stories and tales, discussed for years by those who know him best, and it should not be presumed that early errors or acts indicating honesty are forgotten and no longer remembered either to his credit or discredit, as the case may be. There seems to be very little authority on this point. Most reported cases simply state that the reputation witnesses

were cross-examined as to the defendant's "previous" misconduct without indication as to whether it was recent or not. There are many cases holding that a defendant who takes the stand, or any witness for that matter, may not be impeached by questions as to discreditable incidents which are remote in time. The reasons usually given are that it is unfair to the witness to require him to defend his whole past and that to permit such questions would raise too many collateral issues. See *People* v. *Willy*, 301 Ill. 307, 133 N. E. 859, and cases there cited. But where, as here, the object of the question is not to impeach the character of the witness but to test the basis for the reputation alleged to be possessed by the defendant, these difficulties do not seem to be present. In *State* v. *Willard*, 192 S. W. 437, 440 (Mo.), the Supreme Court of Missouri held that it would be error to permit cross-examination as to a crime committed fifteen years previously unless that act was shown to be so linked with other bad acts in point of time as to leave no space for repentance. The court seemed to think that the lapse of time gave rise to a presumption of reformation. The point of the cross-examination, however, is not to determine what the defendant's character may be, but whether his past misdeeds still cloud his reputation. The case has been criticized as unsound by Wigmore,[19] and it has in effect been overruled

[19] 3 Wigmore, *Evidence* (3rd ed. 1940), § 988, footnote 1, at p. 622.

in *State* v. *Parker*, 321 Mo. 553, 560-561, 12 S. W. 2d 428, 431, in which the defendant's reputation witnesses were permitted to be asked whether they had heard that he had married a notorious prostitute 30 years previously. And in *Stinson* v. *State*, 120 Tex. Cr. 456, 461, 49 S. W. 2d 468, 470-471, it was held that, whereas when the defendant himself is on the stand and the prosecution attacks his character as a witness, cross-examination as to his previous offenses should be limited to those occurring within seven years of the trial, no such limitation applied to cross-examination of reputation witnesses.[20]

Furthermore, even under the rule of the *Willard* case, there was evidence here to indicate that no reformation had taken place. This was not a mere youthful indiscretion or a totally isolated shadow on petitioner's reputation for honesty. He was about 30 years of age in 1920 and had already been engaged in the second-hand jewelry business for

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[20] The only one of the cases cited by petitioner (Br. 13) which is strictly in point is *State* v. *Bell*, 206 Ia. 816, 221 N.W. 521, in which cross-examination as to offenses committed 12 and 8 years prior to trial was excluded because the witnesses were questioned as to their knowledge of the fact, not of the rumors. The court added as an afterthought that the prior offenses were too remote anyway. In *Sloan* v. *United States*, 31 F. 2d 902, 906 (C. C. A. 8), the misconduct inquired about had occurred *after* the offense for which the defendant was being tried. *People* v. *Willy*, 301 Ill. 307, 133 N.E. 859, was concerned with rebuttal testimony by prosecution witnesses, not with cross-examination of the defendant's reputation witnesses. *Burnett* v. *State*, 34 Ariz. 129, 268 P. 611, was a homicide case in which the state offered evidence of the peaceful character of the deceased, which was objected to as too remote.

several years (R. 68-69). He admitted that in 1927 he had been convicted and fined for possession of counterfeit watch dials (R. 70). He admitted that a license application signed by him in 1930 contained a denial that he had ever been arrested or summoned to court (R. 88-89). And he admitted having entered into the corrupt bargain with Kratter (R. 77, 82, 83).

It is, of course, settled that the scope of cross-examination is a matter which rests within the sound discretion of the trial court (*Glasser* v. *United States*, 315 U. S. 60, 83; *Alford* v. *United States*, 282 U. S. 687, 694); and this rule has frequently been applied to cross-examination of reputation witnesses in respect of derogatory reports. *Mannix* v. *United States*, 140 F. 2d 250 (C.C.A. 8); and see cases collected in Note, 71 A.L.R. 1504, 1519. Petitioner chose to make an issue of his reputation for business honesty. His own admissions cast doubt upon the validity of the reputation given him by the witnesses. We think the court was within the allowable scope of its discretionary powers in permitting the witnesses to be examined as to whether their estimates took into consideration the 1920 arrest. Certainly, in view of the decision of the court below, it can scarcely be said that reasonable men could not differ as to the propriety of the action taken by the trial court. See *Delno* v. *Market Street Ry. Co.*, 124 F. 2d 965, 967 (C.C.A. 9).

II

EVEN ON THE SUPPOSITION THAT CROSS-EXAMINATION WAS ERRONEOUS, PETITIONER'S SUBSTANTIAL RIGHTS WERE NOT AFFECTED

Finally, even conceding *arguendo* that the ruling of the trial court was erroneous, we do not believe this would require a reversal of petitioner's conviction. As this Court recently pointed out in interpreting the "harmless error" statute,[21] the prejudicial effect of an alleged error in a criminal trial cannot be judged *in vacuo* but must be determined with reference to the case as a whole. The question is "what effect the error had or reasonably may be taken to have had upon the jury's decision. * * * If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand * * *." *Kotteakos v. United States*, 328 U. S. 750, 764. In our opinion the alleged error in no way affected petitioner's substantial rights.

It has frequently been held that where, as here (*supra*, p. 9), the reputation witness answers the questions as to rumors in the negative, an error in asking the question, unaccompanied by circumstances which show that the prosecutor was acting in bad faith, is purely technical and causes no substantial damage. *Little v. United States*, 93 F. 2d

[21] 28 U.S.C. 391; see also Rule 52(a), Federal Rules of Criminal Procedure.

401, 408 (C.C.A. 8), certiorari denied, 303 U. S. 644; *Reuben* v. *United States*, 86 F. 2d 464, 467-468 (C.C.A. 7), certiorari denied, 300 U. S. 671; *Proctor* v. *United States*, *supra*; *Jung Quey* v. *United States*, *supra*; and see cases collected in Note, 71 A.L.R. 1504, 1539-1540.

The only effect which the cross-examination could have had upon the minds of the jury here would have been to shake their confidence in the good reputation ascribed to petitioner by his witnesses, for they were told three times that this was the only purpose for which they could consider the questions (*supra*, pp. 9-10). But by the time these witnesses began to appear in the box the jury already knew, from petitioner's own admissions, that he had been convicted in 1927, that he had submitted a license application in 1930 containing a false statement, and that he had given Kratter $5,000 in order to prevent Kratter from reporting him to Federal authorities. In view of all these antecedent destructive admissions, we do not see how the mere intimation of an arrest, unconfirmed by any witness, can have had any appreciable effect upon the jury's opinion as to petitioner's reputation. In their minds the testimony of the reputation witnesses must already have been discounted.

Furthermore, we submit that on the crucial issue in the case, i.e., whether the criminal design originated with petitioner or with Kratter, the great weight of the evidence is against petitioner. The

Government's evidence, countered only weakly by petitioner, shows that the conduct of both Kratter and petitioner, subsequent to Kratter's report of the matter to his superior, was totally inconsistent with petitioner's contention that Kratter was the extortioner and petitioner the pursued. Thus when Kratter, in the presence of his superior, called petitioner on July 26, 1946, he told petitioner that he was taking the money only because petitioner insisted, that he had never wanted to get involved in such a matter, and that he would drop the whole thing if petitioner did not come to the hotel (R. 21-22). If petitioner had then protested against this statement of the situation he would undoubtedly have testified to that effect when he took the stand. Then again the agent who took notes of the interview between Kratter and petitioner in the hotel room testified, with the corroboration of three other agents, that the following exchange took place (R. 54; see also R. 24, 59, 63):

> KRATTER. You insisted that I do something.
>
> MICHELSON. Yes.
>
> KRATTER. And in fact you wouldn't let me go unless I promised.
>
> MICHELSON. Well, naturally.
>
> KRATTER. I tried to get away from you—I wouldn't touch it—I wouldn't handle it, but I figured I would work with you. On what you want to pay in excess of the sum—whatever you set it's got to be, but you set the figure.
>
> MICHELSON. Certainly. I figured we should

> make it like it's for both years. This is separate, only you should make it $1,200, and the other year $900—that would be very fair.

And, finally, when petitioner was arrested he was given ample opportunity to explain. But he made no accusation against Kratter, nor did he say anything to indicate that he thought he was paying the $5,000 to the Government. The only thing he could say was, "Anything I could say would only hurt me" (R. 24, 60-61).

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the circuit court of appeals should be affirmed.

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